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UNITED STATES OF AMERICA, STATE OF DELAWARE, COMMONWEALTH OF VIRGINIA, STATE OF CALIFORNIA, STATE OF HAWAII, STATE OF NEVADA, STATE OF TENNESSEE, STATE OF ILLINOIS, STATE OF NEW HAMPSHIRE, DISTRICT OF COLUMBIA, STATE OF FLORIDA, STATE OF MASSACHUSETTS, STATE OF TEXAS, STATE OF LOUISIANA EX REL. MARK RADCLIFFE,

Petitioners,

v.

PURDUE PHARMA L.P.; PURDUE PHARMA, INCORPORATED,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When, if at all, may a government contractor, consistent with public policy, prohibit an employee, as a condition of employment or severance pay, from bringing a False Claims Act *qui tam* action to recover to the federal treasury monies that the contractor obtained by fraud from the United States?

2. Does a citizen, solely by becoming aware of fraud committed by a government contractor against the Government, thereby gain a cognizable legal interest in the Government's fraud claim? Or does the citizen gain an interest in the claim only by filing a False Claims Act *qui tam* action against the contractor alleging the fraud?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioner is Mark Radcliffe, as relator on behalf of the United States, State of Delaware, Commonwealth of Virginia, State of California, State of Hawaii, State of Nevada, State of Tennessee, State of Illinois, State of New Hampshire, District of Columbia, State of Florida, State of Massachusetts, State of Texas, and the State of Louisiana.

The respondents are Purdue Pharma, L.P. and Purdue Pharma, Inc.

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 9

I. Certiorari Is Warranted To Review The Fourth Circuit's Holding That A Government Contractor Can, As A Condition Of Severance Pay, Bar Its Former Employee From Bringing A *Qui Tam* Action Against The Contractor As Long As The Government Was Aware Of The Fraud Allegations. 10

A. The Fourth Circuit's Decision Deepens An Existing Conflict Among The Circuits. 10

B. The Fourth Circuit's Holding Is Wrong Because It Seriously Undermines The Purposes Of The FCA. 16

II. Certiorari Is Also Warranted Because The Fourth Circuit's Holding That, Merely By Learning Of Contractor Fraud Against The Government, A Citizen Thereby Gains An Interest In The Government's Inchoate Fraud Claim, Is In Conflict With This Court's Precedent 25

A. The Decision Of The Fourth Circuit Conflicts With This Court's Decision In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, *529* U.S. 765 (2000). 25

B. The Fourth Circuit's Holding Will Thwart Many *Qui Tam* Actions By Former Employees Of Government Contractors. 29

CONCLUSION 30

APPENDIX

Opinion
United States Court of Appeals
for the Fourth Circuit
entered March, 24, 2010 ..... A-1

Unsealed Opinion
United States District Court
for the Western District of Virginia
Abingdon Division
entered October 14, 2008 ..... A-31

Order
United States Court of Appeals
for the Fourth Circuit
Re: Denying Petition for Rehearing and
Rehearing En Banc
entered May 21, 2010 ..... A-70

31 U.S.C. § 3729 (2000)
(FALSE CLAIMS ACT) A-72

Petition for Panel Rehearing and
Rehearing En Banc
United States Court of Appeals
For the Fourth Circuit
entered April 7, 2010 ..... A-108

Letter
United States District Court
for the Western District of Virginia
Abingdon Division
entered February 20, 2008 ..... A-121

Government's Motion
United States District Court
for the Western District of Virginia
Abingdon Division
entered November 30, 2007 ..... A-124

Exhibit
United States District Court
for the Western District of Virginia
Abingdon Division
entered October 2, 2007 ..... A-130

TABLE OF AUTHORITIES

Page:

Cases:

Buckley v. Fitzsimmons,
509 U.S. 259 (1993)..... 18

Kelly v. Boeing Co.,
9 F.3d 743 (9th Cir. 1993)..... 26, 27

Town of Newton v. Rumery,
480 U.S. 386 (1987)..... 11, 12

United States ex rel. Bahrani v. Conagra, Inc.,
183 F. Supp. 2d 1272 (D. Colo. 2002)..... 14

United States ex rel. Berge v. Bd. of Trustees,
104 F.3d 1453 (4th Cir.), *cert denied*,
522 U.S. 916 (1997)..... 20

United States ex. rel. DeCarlo v.
Kiewit/AFC Enters., Inc.,
937 F. Supp. 1039 (S.D.N.Y. 1996) 14

United States ex rel. Gebert v.
Transp. Admin. Servs.,
260 F.3d 909 (8th Cir. 2001)..... 14, 26

United States ex rel. Green v. Northrop,
59 F.3d 953 (9th Cir. 1995)..... *passim*

United States ex rel. Hall v. Teledyne Wah Chang Albany,
104 F.3d 230 (9th Cir. 1997) ..... *passim*

United States v. Health Possibilities,
207 F.3d 335 (6th Cir. 2000) 21

United States ex rel. Longhi v. Lithium Power Tech. Inc.,
575 F.3d 458 (5th Cir. 2009) *aff'g*,
481 F. Supp. 2d 815
(S.D. Tex. 2007) 10-11, 19, 24

United States ex rel. Radcliffe v. Purdue Pharma,
600 F.3d 319 (4th Cir. 2010) 11

United States ex rel. Ritchie v. Lockheed Martin Corp.,
558 F.3d 1161 (10th Cir. 2009) ..... *passim*

United States ex rel. Springfield Terminal Ry. v. Quinn,
14 F.3d 645 (D.C. Cir. 1994) 17

United States ex rel. Zaretsky v. Johnson Controls, Inc.,
457 F.3d 1009 (9th Cir. 2006) 12

Vermont Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765 (2000) 25, 26, 28

Statutes:

28 U.S.C. § 1254(1) 1

31 U.S.C. § 3729 1

31 U.S.C. § 3729 *et seq.* 2

31 U.S.C. § 3729(a) 2, 19

31 U.S.C. § 3730(a) 2

31 U.S.C. § 3730(b)(0) 17

31 U.S.C. § 3730(b)(1) 1, 2, 21

31 U.S.C. § 3730(b)(2) 2

31 U.S.C. § 3730(c)(3) 1

31 U.S.C. § 3730(d)(1) 2, 3, 20

31 U.S.C. § 3730(d)(2) 2, 3, 20

Other:

Kelly Flanagan, *False Claims Act – The Tenth Circuit Fails To Fully Consider The Harm To Public Policy Caused By Enforcement Of A Prefiling Release Agreement In A Qui Tam Action: United States Ex Rel. Ritchie v. Lockheed Martin Corp.*, 75 J. Air L. & Com. 197, 202 (2010) 19

S. Rep. No. 99-345 (1986) 16, 17

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. A-1) is reported at 600 F.3d 319. The opinion of the district court (Pet. App. A-31) is reported at 582 F. Supp.2d 766.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 24, 2010. (Pet. App. A-1) On April 7, 2010, Radcliffe timely petitioned the court for a rehearing. (Pet. App. A-108) The court entered its order denying the petition for rehearing on May 21, 2010. (Pet. App. A-70) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The provisions of the False Claims Act most relevant to this case are as follows:

> Actions by private persons. (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

31 U.S.C. § 3730(b)(1)(2000). "If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." *Id.* at (c)(3).

> Award to the *qui tam* plaintiff. (1) if the Government proceeds with an action brought by a person under subsection (b), such person

> shall . . . receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim.
>
> * * * * * *
>
> (2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall not be less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds.

31 U.S.C. § 3730(d)(1), (2). The text of the False Claims Act is set out in Petitioner's Appendix at A-72 – 107.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, prohibits false or fraudulent claims for payment to the United States. 31 U.S.C. § 3729(a). The FCA authorizes the Attorney General to bring a civil action against one who has violated the FCA. 31 U.S.C. § 3730(a). Alternatively, a private citizen (known as the relator) may bring a *qui tam* civil action "in the name of the Government." 31 U.S.C. § 3730(b)(1).

If a relator brings a *qui tam* action, the Government may intervene in the action and take the lead in prosecuting it. 31 U.S.C. § 3730(b)(2). If the Government intervenes, and the Government and relator are successful in obtaining a recovery for the United States, then the relator is entitled to an award of between 15% and 25% of the total recovery.

31 U.S.C. § 3730(d)(1). If the United States declines to intervene, and the relator prosecutes alone and is successful in obtaining a recovery for the United States, then the relator is entitled to an enhanced award of between 25% and 30% of the total recovery. 31 U.S.C. § 3730(d)(2).

2. On September 27, 2005, plaintiff-relator Mark Radcliffe filed a FCA *qui tam* action in federal district court alleging that his former employer, Purdue Pharma, L.P. ("Purdue"), defrauded the Government (primarily its Medicaid program) by misrepresenting the potency and relative cost of its pain-relief drug, OxyContin, to physicians and other decision-makers, who wrote prescriptions that were paid by Medicaid. Radcliffe's action alleged violations of the federal FCA, as well as violations under various analogous state statutes.

3. Between 1996 and 2005, Radcliffe was employed by Purdue as a sales manager. (Pet. App. A-6) While he was employed, he learned of Purdue's alleged misrepresentations regarding OxyContin's relative potency and relative cost. *Id.*

4. Beginning in 2002, and continuing for the next several years, the federal government investigated Purdue's marketing of OxyContin. (Pet. App. A-7)

5. In 2005, one area of the Government's investigation of Purdue's marketing of OxyContin was the subject matter of what became Radcliffe's allegations in his *qui tam* action — Purdue's relative potency and cost savings claims for OxyContin. (Pet. App. A-51.) However, Radcliffe did not disclose to the Government his allegations of fraud until he filed his *qui tam* action. (Pet. App. A-7)

6. In June 2005, Purdue gave Radcliffe an ultimatum — either accept a transfer or be fired. He refused the transfer. (Pet. App. A-9) In order to receive his severance pay, Purdue required that Radcliffe execute Purdue's boilerplate release of claims. (Pet. App. A-10) On August 1, 2005, Radcliffe signed Purdue's release ("Release"). (Pet. App. A-130) The Government had no connection to the Release or its execution. And the Government did not consent to, and was unaware of, Radcliffe's execution of the Release.

7. The Release contained the following pertinent language

> 4. Employee . . releases and forever discharges [Purdue], of and from any and all liability to Employee for actions or causes of action, suits, claims, charges, complaints, contracts . . .,, whatsoever in law or equity, **which Employee . . ever had, may now have or hereafter can, shall or may have, against [Purdue] as of the date of the execution of this Agreement,** including all unknown, undisclosed and unanticipated losses, wrongs, injuries, debts, claims, or damages to [Employee], for upon, or by reason of any matter, cause or thing whatsoever.
>
> 5. To the maximum extent permitted by law, Employee agrees that Employee will not seek and waives any right to accept any relief or award from any charge or action against [Purdue] before any federal, state or local administrative agency or federal, state or local court whether filed by Employee or on

> Employees's behalf **with respect to any claim or right covered by paragraph 4.**
>
> * * * * * * * *
>
> 16. EMPLOYEE ., , , INTEND[s] TO . . . RELEASE ALL LIABILITY . . . FROM **CLAIMS EMPLOYEE EVER HAD, NOW HAS OR MIGHT HAVE AGAINST THE COMPANY AS OF THE DATE OF THE EXECUTION OF THIS AGREEMENT.**

(Pet. App. A-10-11(emphasis added)). The text of the Release is set out in Petitioner's Appendix at A-130-160.

8. After Radcliffe signed the Release, and after he filed his *qui tam* action, the Government's investigation of Purdue's marketing claims continued. (Pet. App. A-50)

9. On May 7, 2007, the Government declined to intervene in this *qui tam* action. However, the Government stated in a motion that it filed with the district court that "it took no position on the merits" of the allegations in the *qui tam* complaint. (Pet. App. A-125, ¶ 4)

10. Two days later, the Government filed criminal charges against a related Purdue entity and several Purdue executives. (Pet. App. A-9)

11. On June 20, 2007, the Purdue affiliate, which manufactured and distributed OxyContin, pled guilty to a felony charge of illegally misbranding OxyContin in order to mislead and defraud physicians and consumers. (408[1]) The Purdue

[1]This number refers to the page number of the Joint Appendix filed in the Fourth Circuit below.

affiliate acknowledged that it criminally misbranded OxyContin by "falsely claiming that OxyContin was less addictive, less subject to abuse and diversion, and less likely to cause withdrawal symptoms than other pain medications." (408) The Purdue affiliate paid over $600 million in criminal fines, forfeitures and civil recoveries. (408) Additionally, three top Purdue executives, including General Counsel Howard Udell, pled guilty to criminal charges of misbranding OxyContin. (408)

12. The misbranding charges did not pertain to Radcliffe's allegations in this *qui tam* action of Purdue's misrepresentations of the relative potency and cost savings for OxyContin, and although the plea agreements settled certain civil actions by the Government, they did not address the claims made in this *qui tam* action. (Pet. App. A-9)

13. Purdue moved to dismiss the complaint on three grounds: (1) bar and release; (2) the public disclosure bar; and (3) the failure to comply with Rule 9(b). The district court allowed discovery limited to the bar and release issue. The discovery focused on if and when the Government became aware of, and investigated, Radcliffe's allegations prior to the filing of his complaint. The district court denied Purdue's motion to dismiss as to the public disclosure bar and the bar and release, ruling that the enforcement of the release to bar Radcliffe's *qui tam* action was contrary to public policy.

14. In its decision, the district court addressed the issue of whether public policy precluded the enforcement of the Release to bar the *qui tam* action, without addressing the issue of whether the terms of the Release encompassed the *qui tam* action by

applying "the framework established by the Ninth Circuit in *United States ex rel. Green v. Northrop*, 59 F.3d 953 (9th Cir. 1995) and *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230)(9th Cir. 1997). (Pet. App. A-53). Applying the *Green/Hall* framework, the district court determined that for the release to fall within the exception to the general rule that enforcement of a release to bar a later-filed *qui tam* action, the Government, prior to the execution of the release, had to have known of the relator's allegations, and to have completed an investigation of them. (Pet. App. A-59-62) Because the Government's investigation was still ongoing at the time the Release was executed by Radcliffe (and at the time Radcliffe filed this action), the district court concluded that the Release did not fit within the exception to nonenforceability. (Pet. App. A-63)

15. The district court did grant Purdue's motion on the Rule 9(b) grounds, but granted leave to Radcliffe to amend. Radcliffe amended his complaint, and Purdue renewed its motion to dismiss. The district court granted Purdue's motion and dismissed the action with prejudice.

16. Radcliffe appealed the district court's dismissal and denial of leave to amend. Purdue cross-appealed the district court's denial of its motion to dismiss on the grounds of release and bar.

17. On March 24, 2010, the Fourth Circuit affirmed the district court's dismissal based on the issue raised by Purdue in its cross-appeal, bar and release, thereby reversing the district court's ruling on that issue. The Fourth Circuit did not address the Rule 9(b) issue.

18. In its decision, as an initial matter, the Fourth Circuit determined, that at the time he entered into the Release, and prior to his filing of the FCA *qui tam* action alleging that Purdue had defrauded the Government, Radcliffe had a cognizable legal interest in the Government's fraud claim by virtue of the fact that Radcliffe had learned of the fraud by that time. (Pet. App. 21) The Fourth Circuit concluded that the FCA assigned a "partial interest" in the Government's fraud claim to Radcliffe when he became aware of Purdue's alleged fraudulent actions, not when Radcliffe filed his *qui tam* action. *Id.*

19. In determining that the Release was enforceable to bar this *qui tam* action, the Fourth Circuit held that while public policy concerns generally preclude the enforcement of releases to bar a later-filed FCA *qui tam* action, those concerns do not preclude such enforcement if the Government has become aware of the allegations of fraud prior to the filing of the *qui tam* action. (Pet. App. A-12) The Fourth Circuit conceded that enforcement undermined the supplemental enforcement of the FCA by private citizens like Radcliffe, which is one of the key purposes of the FCA; however the court determined that the public interest in supplemental enforcement was outweighed, in part, by the interest in giving a government contractor an added incentive to disclose to the Government allegations that the contractor committed fraud against the Government, the added incentive being that the contractor could then enforce releases barring *qui tam* claims once it disclosed. (Pet. App. A-17)

REASONS FOR GRANTING THE PETITION

This petition provides the Court with an opportunity to resolve a split among the circuits as to the circumstances in which a government contractor can bar its employee, as a condition of employment or severance pay, from bringing a *qui tam* action under the False Claims Act to recover to the United States treasury monies that the contractor has defrauded the United States. The resolution of this issue is important to the United States because the False Claims Act is our nation's most important tool in fighting fraud against the Government. The enforcement of these contractual prohibitions will undermine the supplemental enforcement of the FCA by barring private citizens from bringing *qui tam* actions to restore the proceeds of fraud to the federal treasury, thereby potentially costing the United States billions of dollars.

This petition also provides the Court with the opportunity to correct a holding of the Fourth Circuit — that a private citizen has a legally cognizable interest in the Government's claim of fraud against a contractor simply by learning of the fraud — that is in direct conflict with a decision of this Court. This Court has made clear that the private citizen has cognizable interest in that claim only if and when that citizen files an FCA *qui tam* suit alleging the fraud, thereby triggering a "partial assignment" of the fraud claim pursuant to the FCA. The resolution of this issue is important because, under the Fourth Circuit's holding, potential whistleblowers would thereby have an existing personal cognizable legal interest as a result of learning of contractor fraud, which interest would fall within the scope of typical

general release found in employment and severance agreements. In conjunction with the Fourth Circuit's other holding that releases barring later *qui tam* actions can be enforceable, this holding will have the effect of barring, or at least discouraging, thousands of former employees of contractors who are defrauding the government from enforcing the FCA by bringing *qui tam* actions against those contractors to recover monies to the federal treasury.

I. Certiorari Is Warranted To Review The Fourth Circuit's Holding That A Government Contractor Can, As A Condition Of Severance Pay, Bar Its Former Employee From Bringing A *Qui Tam* Action Against The Contractor As Long As The Government Was Aware Of The Fraud Allegations.

A. The Fourth Circuit's Decision Deepens An Existing Conflict Among The Circuits.

The circuits are split on the issue of when public policy allows a contractor to bar one of its employees or former employees from bringing a False Claims Act *qui tam* action to recover to the federal treasury that the contractor has defrauded from the Government. On the one hand, the Ninth and Fifth Circuits have held that public policy considerations prevent enforcement of a contract barring a citizen from bringing a False Claims Act *qui tam* action *unless* at the time the contract was entered, the United States Government already 1) was aware of the allegations to be asserted in that *qui tam* action; and 2) had fully investigated those allegations (and found them to be meritless). *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997); *United States ex. rel. Longhi v.*

Lithium Power Tech. Inc., 575 F.3d 458 (5th Cir. 2009)("The district court correctly determined that enforcing the release against [the relator] was against public policy."), *aff'g* 481 F. Supp. 2d 815, 818-22 (S.D. Tex. 2007)(applying *Green* and the test in *Hall* to determine release was unenforceable on public policy grounds). On the other hand, the Tenth Circuit (and now the Fourth Circuit) has held that public policy considerations do not prevent enforcement of a contract barring a citizen from bringing a False Claims Act *qui tam* action if the Government is merely aware of the allegations of fraud at the time the contract is being entered into. *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161 (10th Cir. 2009); *U.S. ex rel. Radcliffe v. Purdue Pharma*, 600 F.3d 319 (4th Cir. 2010)(relying on *Ritchie*).

Green involved a general release between an employer and terminated employee, who subsequently filed a *qui tam* suit against that employer. *Green*, 59 F.3d at 956. Upon the filing of the *qui tam* suit, the Government investigated the allegations, but chose not to intervene. *Id.* at 956-57. The district court held that employer could enforce the release to bar the *qui tam* action. *Id.*

Reversing, the Ninth Circuit held that a pre-filing release entered into without the Government's knowledge or consent is not enforceable to bar a subsequent *qui tam* action because enforcing it would impair a substantial public policy. *Id.* In doing so, the Ninth Circuit applied the decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), which held that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by

enforcement of the agreement." *Green*, 59 F.3d at 962 (quoting *Rumery*, 480 U.S. at 392). The Ninth Circuit determined that the enforcement of the release would impair the public interest by significantly undermining the effectiveness of the FCA. *Id.* at 421. The FCA delegates a crucial role in its enforcement to private citizens. The FCA empowers citizens to bring *qui tam* actions to enforce the FCA and recover monies to the federal treasury. The FCA incentivizes citizens to bring and prosecute these *qui tam* actions by providing that a portion of the recovery, no more than 30%, is to go to the private citizen. Because a citizen is entitled to only a portion of the recovery could benefit financially by settling without involving the government, the citizen would have the perverse incentive to settle for less, knowing that he was going to receive the entire amount, instead of thirty percent at most. If he settles with the potential defendant, and the bargained-for release is enforceable, then the citizen's incentive to bring and prosecute the *qui tam* action is eviscerated. The Ninth Circuit concluded that this harm to the effectiveness of the FCA resulting from enforcing a release barring the bringing of a *qui tam* action far outweighed the interest in enforcing the release. *Id.* at 962.

Later, the Ninth Circuit in *Hall* recognized a narrow exception to the general rule against enforcing pre-filing releases to bar subsequent *qui tam* suits.[2] 104 F.3d at233. In *Hall,* an employer

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[2] The Ninth Circuit subsequently made clear that *Hall* was not overturning *Green*, but rather, it was setting forth an exception to the general rule of unenforceability of pre-filing releases established in *Green*. *United States ex rel. Zaretsky v. Johnson Controls, Inc.*, 457 F.3d 1009, 1019 (9th Cir. 2006).

had been accused by an employee of fraud on the government. However, a federal regulatory agency learned of the allegations, fully investigated them, and concluded that they were unfounded. During the course of the agency's investigation, the employee was terminated and brought a state court action. The state court action resulted in a settlement and general release, which was executed after the agency had completed its investigation. Later, the former employee brought an FCA *qui tam* action. The court in *Hall* determined the release was enforceable to bar the *qui tam* action because the two concerns animating the general rule against enforceability in *Green* were not present:

> In this case, the concerns that led us to deny enforcement in *Green* are not present. **[1]** The federal government was aware of Hall's allegations regarding false certifications. Therefore, the public interest in having information brought forward that the government could not otherwise obtain is not implicated. **[2]** The public interest in the use of *qui tam* suits to supplement federal enforcement of the FCA is also not disturbed, because the federal government had already investigated the allegations prior to settlement.

Hall, 104 F.3d at 233 (numbers in brackets added) *Hall* makes clear that for the exception to apply, as of the date of the settlement (release): 1) the Government must have "had full knowledge of the plaintiff's charges;" and 2) the Government must already "had investigated them" (and found them to

be meritless).[3] *Id.* at 231; *see also Johnson Controls*, 457 F.3d at 1019 (describing *Hall* as "distinguishing *Green* and enforcing [a pre-filing release to bar a later *qui tam* action] in a case in which the government was aware of and had investigated the relevant allegations"); *United States ex rel. Bahrani v. Conagra, Inc.*, 183 F. Supp. 2d 1272, 1275,-78 (D. Colo. 2002) ("For the Release to be enforceable under the *Hall* exception to the general rule, this required defendants to demonstrate that the federal government both knew of [relator's] allegations and investigated them before [the release was executed].").

The framework established by *Green* and *Hall* has been the predominant framework used by federal courts in addressing the enforceability of pre-filing releases to bar *qui tam* actions. *See United States ex rel. Gebert v. Transp. Admin. Servs.*, 260 F.3d 909, 916 (8th Cir. 2001); *United States ex rel. Bahrani v. Conagra, Inc.*, 183 F. Supp. 2d 1272, 1275,-78 (D. Colo. 2002); *United States ex. rel. DeCarlo v. Kiewit/AFC Enters., Inc.*, 937 F. Supp. 1039, 1043-47 (S.D.N.Y. 1996).

In *Ritchie*, the Tenth Circuit purported to "adopt the Ninth Circuit's framework [set forth in *Green* and *Hall*] for analyzing releases of FCA claims," *Id.*

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[3] *Hall*'s requirement that the Government conclude from its investigation that the allegations were without merit is implied, not express. The Sixth Circuit in *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161 (10th Cir. 2009), construed *Hall* in that way. *Id.* at 1169 ("because the allegations were deemed baseless by the government, the interest in supplementing federal enforcement of the FCA claims was not implicated").

at 1170, but then conceded that it was departing from it. *Id.* *Ritchie* involved an employee who accused his employer of fraud. The employee entered into a general release with his employer. At that time, the Government had already learned of the fraud allegations, but had not completed an investigation of those allegations. After he signed the release, the employee filed a *qui tam* action. The district court enforced the release to dismiss the action. Affirming the district court, the Tenth Circuit concluded that the release was enforceable.

In holding that the release was enforceable, the court in *Ritchie* made clear that it was parting ways with the analysis in *Hall*:

> the public interest in supplementing federal enforcement of the FCA was not applicable [in *Hall*], since there is no public interest in supplementing the enforcement of [claims that the Government had determined after its investigation to be "meritless"]. Here the federal government had not issued its final audit report when the settlement was reached or the *qui tam* suit was filed, **so the interest in supplementing federal enforcement is still present.**

Id. at 1171 (emphasis added). Thus, the release failed one of the two requirements set forth in *Hall* — the one protecting the federal interest in supplementing federal enforcement of the FCA, which is that the Government must have already investigated the fraud allegations (and determined that they were meritless) before the release was executed. The Tenth Circuit nonetheless found the release enforceable by finding that this interest in

supplementing federal enforcement of the FCA was outweighed by the interest in enforcing the settlement.

The Fourth Circuit in this case "concur[red] with the Tenth Circuit [in *Ritchie*] that when, as in this case, the government was aware, prior to the filing of the *qui tam* action, of the fraudulent conduct represented by the relator's allegations, the public interest has been served and the Release should be enforced." *Id.* at 332-333.

Accordingly, the Fourth Circuit's decision deepens an existing split between the circuits. Review is warranted to resolve this conflict.

B. The Fourth Circuit's Holding Is Wrong Because It Seriously Undermines The Purposes Of The FCA.

This Court should grant certiorari not only because there is an entrenched circuit split on this issue, but because the decision of the Fourth Circuit improperly undermines the purposes of the FCA. The Fourth Circuit conceded that its decision undermined the public "interest in having private citizens supplement federal enforcement" of the FCA. *Id.* at 332. However, Congress made clear that its "overall intent in amending the *qui tam* section of the FCA [in 1986 was] to encourage more private enforcement suits." S. Rep. No. 99-345, at 34 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5272. Congress determined that those private suits by the citizenry were essential because, as Congress concluded, the federal Government does not have the resources to investigate adequately even those allegations of which it is aware that could lead to significant cases:

> Taking into consideration the vast amounts of Federal dollars devoted to various complex and highly regulated assistance and procurement programs, Federal auditors, investigators, and attorneys are forced to make "screening" decisions based on resource factors. **Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient.**

S. Rep. No. 99-345, at 23 (1986),(emphasis added). Thus, the Fourth Circuit's decision would undermine the key purpose of the 1986 Amendments to the *qui tam* provisions of the FCA.

The Fourth Circuit's self-described "government knowledge" test for determining the enforceability of releases is similar to the "government-knowledge" bar that Congress added to the FCA in 1943, which barred *qui tam* suits that were "based on evidence or information the Government had when the action was brought," 31 U.S.C. § 3730(b)(0)(1982). In amending the FCA in 1986 to replace the "government-knowledge" bar with the "public disclosure" bar, Congress concluded that the absolute bar against *qui tam* actions based on information already in the federal government's possession precluded an unduly broad range of potentially valuable suits. *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 650-51 (D.C. Cir. 1994), The Fourth Circuit's "government knowledge" test has the same pernicious effect.

The Fourth Circuit determined that the interest in supplemental enforcement of the FCA by citizens, an interest rooted in the structure and text of the FCA, was outweighed by the interest in the enforcement of settlements reached "after fraud allegations have been disclosed to the government" because "then contractors effectively have an incentive to disclose." *Id.* at 332 (quoting *Ritchie*); *see also United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1170 (10th Cir. 2009) (enforcement of release where Government knows of fraud allegations will "encourag[e] voluntary disclosure by government contractors"). However, the role of courts is to determine the intent of Congress in enacting statutes, like the FCA, "not to make a freewheeling policy choice," *see Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993), like the one the Fourth Circuit made here by judicially creating an "incentive" for contractors to disclose, and then simply announcing, without any analysis, that the "incentive" is so important that it tips the balance in favor of enforcement of the settlement, and against supplemental enforcement of the FCA.

In fact, not only is this "incentive" not derived from the FCA, it is in conflict with, and undermines, the sole incentive that Congress chose to provide in the FCA to motivate defendants to disclose their fraud to, and cooperate with, the Government: If a defendant 1) provides the Government all of the information it has concerning the fraud "within 30 days after the date on which the defendant first obtained the information," 2) "fully cooperate[s] with any Government investigation of such violation," and 3) there is no ongoing prosecution of the fraud, then and only then may the court double, rather than

treble the damages that the defendant must pay. 31 U.S.C. § 3729(a).[4] Unlike the Fourth Circuit's decision, this method chosen by Congress to incentivize defendants to disclose fraud and cooperate with the Government does not impair Congress' main purpose in the 1986 Amendments of "encourag[ing] more private enforcement suits."

In any case, this "incentive" for contractors to disclose fraud allegations will not further the government's interest in uncovering fraud because contractors are likely to disclose possible fraud only when it is in their best interest to do so, such as when discovery is highly probable anyway. *See, e.g.*, Note, Kelly Flanagan, *False Claims Act – The Tenth Circuit Fails To Fully Consider The Harm To Public Policy Caused By Enforcement Of A Prefiling Release Agreement In A Qui Tam Action: United States Ex Rel. Ritchie v. Lockheed Martin Corp.*, 75 J. Air L. & Com. 197, 202 (2010).

Furthermore, the Fourth Circuit's holding creates a perverse incentive for contractors "guilty of defrauding the United States" to attempt to "insulate themselves from the reach of the FCA by forcing potential relators to sign general agreements invoking release and indemnification from future suit," *United States ex rel. Longhi v. Lithium Power Tech. Inc.*, 575 F.3d 458, 474 (5th Cir. 2009), either when they learn that a Government investigation is already underway, or to silence potential relator-employees and then "disclose" the allegations to the

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[4] It is important to note that, in the FCA, Congress provided no disclosure incentive to government contractors who are not adjudicated guilty of violating the FCA.

Government in a self-serving light, with the hope that the Government would decline further investigation at some stage.

An unstated assumption underlying the Fourth Circuit's holding is that so long as the Government becomes aware of the fraud allegations, then the purposes of the FCA will be adequately served because the Government will then be able to pursue any meritorious claims, rendering the supplemental enforcement efforts of the citizenry unnecessary. However, this assumption conflicts with the structure of the FCA since "the plain language of the Act clearly anticipates that even after the Attorney General has 'diligently' investigated a violation under [the FCA], the Government will not necessarily pursue all meritorious claims," *United States ex rel. Berge v. Bd. of Trustees*, 104 F.3d 1453, 1458 (4th Cir.), *cert denied*, 522 U.S. 916 (1997). "[O]therwise there is little purpose to the *qui tam* provision permitting private attorneys general." *Id.* Furthermore, the FCA increases the incentives for the relator to persevere with the prosecution of the *qui tam* action when the Government chooses not to intervene. *Compare* 31 U.S.C. § 3730(d)(1) (if Government intervenes, relator receives 15% to 25% of proceeds *with* § 3730(d)(2) (if Government does not intervene, relator receives 25% to 30% of proceeds).

In fact, even the Government both learning of, and fully investigating, the fraud allegations would "not negate the public interest in having a private citizen shoulder the burden of prosecut[ing an FCA a *qui tam* action to recover monies lost through fraud" because the Government may decide not to "prosecute on its own for a variety of reasons, such

as the low amount of money involved compared to the cost of prosecution, the low likelihood of success, or the lack of government resources to pursue it." (Pet. App. A-60)

In his insightful dissent in *Ritchie*, Judge Briscoe noted that "[t]he problem with the *Hall* exception [as purportedly applied by the majority in *Ritchie*] is that it undermines one of the other public interests under the FCA; the Government's compensatory interest in recouping funds lost due to fraud." *Ritchie*, 558 F.3d at 1174 (J. Briscoe, dissenting) (noting that Congress in amending the Act in 1986 was seeking to remedy "perhaps the most serious problem plaguing effective enforcement [of FCA] . . . a lack of resources on the part of federal enforcement agencies," citing Senate Report, at 7).

In the FCA, Congress has directed that a *qui tam* action may not be settled without the express consent of the Government, namely, the Attorney General. *See United States v. Health Possibilities*, 207 F.3d 335 (6th Cir. 2000)(construing 31 U.S.C. 3730(b)(1)). The Government's "power to veto a privately negotiated settlement of public claims is a critical aspect of the government's ability to protect the public interest in *qui tam* litigation." *Id.* at 340. That interest, and the need to protect it, exists prior to the filing of the *qui tam* action just as much as it does afterwards. *See Ritchie, 558 F.3d* at 1175-76 (J. Briscoe, dissenting).

Accordingly, the rule most consistent with the text and purposes of the FCA is that any release purporting to settle FCA *qui tam* claims and bar a *qui tam* action, to be enforceable, must have the express consent of the Attorney General. *Id.*; *see*

also Green, 59 F.3d at 965 ("Permitting a prefiling release when the government has neither been informed of, *nor consented to*, the release would frustrate one of the central objectives of the Act." (emphasis added). Under this test, the Release is unenforceable. [5]

Under the Fourth Circuit's decision, an employer who has defrauded the Government can thwart the recovery by whistleblower-employees enforcing the FCA of those ill-gotten funds to the Treasury by requiring that the employees agree not to take those FCA enforcement actions — so long as the Government has some knowledge of the allegations of fraud. This decision allows the enforcement of such agreements even where the Government neither consented, nor was even aware of the agreement.

Any employer who wishes to minimize its exposure to FCA liability would be foolhardy not to require that every employee waive his right to file a *qui tam* action as a condition of continued employment, and as a condition of any severance pay at the termination of employment.

Furthermore, the Fourth Circuit's decision not to limit the determinative Government knowledge, i.e., "what did the Government know of the fraud allegations and when did it know it?", to public disclosures has two undesirable consequences. First,

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[5] This test also has the advantage of eliminating the need to probe the Government's internal processes to determine "whether a third party (the Government) is satisfied with its knowledge and investigation of the alleged fraud." *Ritchie*, 558 F.3d at 1176.

if the Government has not yet publicly disclosed its knowledge, the Fourth Circuit's holding requires that the parties litigating the enforceability of the release attempt to probe the inner workings of the Government's investigations to determine the state of the Government's knowledge at the time that the *qui tam* suit is brought. Since it is not uncommon for the Government to be conducting criminal investigations parallel to its civil fraud investigations, whether and when the Government might have learned of the fraud allegations during its criminal investigations becomes relevant. These investigations, which can include grand jury deliberations, are typically privileged from disclosure and may still be ongoing at the time that the release enforceability issue needs to be resolved. Thus, the Fourth Circuit's decision will often require an unprecedented intrusion into the inner workings of the Government's criminal and civil investigations to ascertain the Government's "knowledge" at the relevant point in time. This concern is not speculative — in this case a key piece of evidence on the release issue was a declaration filed under seal and in camera by an Assistant United States Attorney with the district court stating details of the direction taken by the Government in a criminal investigation (Pet. App. A-51), citing to a declaration by AUSA Richard Mountcastle; that declaration was filed under seal and in camera by the Government (Pet. App. A-121, ¶ 2).

Second, the possibility that, after the whistleblower has taken the courageous step of filing his *qui tam* action, it will be revealed that the Government had already learned of the substance of the allegations in course of a secret investigation,

and that therefore the *qui tam* lawsuit might be dismissed on a technicality unrelated to the merits is huge uncertainty for the wavering potential whistleblower, on top of the other uncertainties, such as whether he will be the first-filed relator. This new additional uncertainty created by the Fourth Circuit's decision is a disincentive to bringing a *qui tam* action and will certainly discourage many whistleblowers from filing suit even where the release would have been subsequently adjudicated as unenforceable. *See, e.g., Longhi*, 575 F.3d at 474. (enforcing release to bar later *qui tam* action "would provide disincentives to future relators").

Finally, by making determinative the Government's knowledge as of the filing of the *qui tam* complaint, the Fourth Circuit's holding compounds the uncertainties concerning the enforceability of a release to bar the *qui tam* action. Even if the release was initially unenforceable on public policy grounds to bar a *qui tam* action because the Government lacked the knowledge of the alleged fraud at that time, the release could subsequently become enforceable depending on the fortuities of the relative timing of the filing of the *qui tam* action and when the Government is deemed to have learned of the allegations of fraud from other sources.

Accordingly, the Fourth Circuit's holding is erroneous and will impair the effective operation of the FCA.

II. Certiorari Is Also Warranted Because The Fourth Circuit's Holding That, Merely By Learning Of Contractor Fraud Against The Government, A Citizen Thereby Gains An Interest In The Government's Inchoate Fraud Claim, Is In Conflict With This Court's Precedent.

A. The Decision Of The Fourth Circuit Conflicts With This Court's Decision In *Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529* U.S. 765 (2000).

In reaching the issue as to whether the Release was unenforceable on public policy grounds to bar Radcliffe's *qui tam* action, the Fourth Circuit first determined whether the scope of the release encompassed *qui tam* actions that Radcliffe might bring subsequent to the execution of the release. It held that it did, finding that "once the government suffered an injury (and [prospective *qui tam* relator] became aware of the fraud causing the injury), [he] had a statutory claim . . . as partial assignee before he filed a *qui tam* suit." (Pet. App. A-21). As demonstrated below, this holding is completely at odds with this Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765 (2000).

In *Stevens*, this Court set forth the rationale as to why a private citizen has standing to bring an FCA *qui tam* action to recover monies fraudulently obtained from the United States Government: "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Id.* at 773. Thus, "the [FCA] statute gives the relator himself an interest in the [FCA *qui tam*]

lawsuit." *Id.* at 772. A necessary predicate for this Court's holding is that, prior to filing the *qui tam* suit, the potential relator does not have "any right, claim or demand." *Stevens*, 529 U.S. at 773 n. 3. Quoting Blackstone's discussion of English *qui tam* actions with approval, this Court noted that "no particular person, A or B, has any right, claim or demand, in or upon [the bounty], till after [the] action [was] brought." *Id.*

The United States, in an amicus brief it filed in a case before the Eighth Circuit, agreed that this lack of any cognizable claim accruing to the relator prior to his filing of the *qui tam* action is compelled by *Stevens*:

> [U]ntil the relators actually filed a *qui tam* action, the FCA claims could have been asserted, under appropriate circumstances, by any other individual with knowledge of the alleged fraud. Thus, . . . **the "assignment" of the government's claim of injury could not have occurred until the relators actually filed their FCA action.**

(Brief For The United States As Amicus Curiae filed in *United States ex rel. Gebert v. Transport Admin. Servs.*, 260 F.3d 909 (8th Cir. 2001)(emphasis added)(citing *Stevens*))(Doc. 64-5, at sec. III, ¶ 2).[6] Indeed, as the Ninth Circuit has explained, under the "assignment" theory of standing, the potential

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[6] Although the Eighth Circuit in *Gebert v. Transp. Admin. Servs.*, 260 F.3d 909 (8th Cir. 2001), ruled contrary to the Government's position, *Gebert* offers no useful analysis on this point, and its holding is based primarily on an erroneous reading of its only cited authority, *Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993). *See* 260 F.3d at 914.

relator accepts the FCA's offer of an assignment and thereby receives the interest only by the act of filing the *qui tam* complaint:

> [T]he FCA effectively assigns the government's claims to *qui tam* plaintiffs such as Kelly, who then may sue based upon an injury to the federal treasury. Under this theory of standing, **the FCA's *qui tam* provisions operate as an enforceable unilateral contract. The terms and conditions of the contract are accepted by the relator upon filing suit.**

Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993)(adopting assignment theory of standing prior to *Stevens*)(emphasis added).

The Fourth Circuit's attempt to square its conclusion with *Stevens* — "[i]n short, [Radcliffe] had 'an interest in the lawsuit' regardless of when he opted to vindicate it," (Pet. App. A-21) — lays bare the internal inconsistency of the Fourth Circuit's conclusion. One "vindicates" a *claim* by filing a lawsuit; one does not vindicate "an interest in the lawsuit" by filing the lawsuit. A *qui tam* lawsuit does not exist until the private citizen files it. And there is no "relator" until the suit is filed. By filing the *qui tam* lawsuit, a relator vindicates the *Government's* fraud claim, and thereby accepts the FCA's offer of a partial assignment of the Government's interest in that lawsuit. *Kelly*, 9 F.3d at 948 ("The terms and conditions of the contract are accepted by the relator upon filing suit.").[7]

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[7] Under the logic of the Fourth Circuit's holding, the Government gives each person knowing of false claims the

Accordingly, the Fourth Circuit's holding is in conflict with the *Stevens* decision on this point, as correctly construed by the United States.

The three paragraphs in the Release are 4, 5 and 16. Paragraph 5 is relevant only if paragraph 4 is applicable since it is restricted to "any claim or right covered by paragraph 4." (*Id.*) The language in paragraph 4 releases of "**all liability to Employee** for . . . claims . .. which Employee . . . ever had, may now have or hereafter can, shall or may have . . . **as of the date of the execution of this Agreement** [August 1, 2005]." (Id. (emphasis added)). Similar key language in paragraph 16 states:

> EMPLOYEE ., , , INTEND[s] TO . . . RELEASE ALL LIABILITY . . . FROM **CLAIMS EMPLOYEE EVER HAD, NOW HAS OR MIGHT HAVE AGAINST THE COMPANY AS OF THE DATE OF THE EXECUTION OF THIS AGREEMENT** [August 1, 2005].

(Id. (emphasis added)). Thus, the Release included only Radcliffe's claims against Purdue existing as of August 1, 2005. Because Radcliffe did not file his *qui tam* action, and thereby receive his partial assignment of the Government fraud claim (and had no cognizable interest in it), until after August 1, 2005, that partial interest of his was not subject to the operation of the Release. Accordingly, the resolution of this issue in favor of Radcliffe is

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same partial assignment of potential *qui tam* proceeds, simultaneously. This is yet another indication of the fallacy of its holding.

determinative of the Fourth Circuit's decision, and is an additional, sufficient basis for reversing it.

B. The Fourth Circuit's Holding Will Thwart Many *Qui Tam* Actions By Former Employees Of Government Contractors.

The language used in the Release to denote its scope is essentially identical to that used in a standard employment severance agreements. By characterizing a potential whistleblower's power under the FCA to recover for the U.S. Treasury monies fraudulently taken from the United States as an existing claim personal to the whistleblower, the Fourth Circuit put that power within the scope of boilerplate general release provisions of tens of thousands of run-of-the-mill severance agreements and releases.

Consequently, the Fourth Circuit's holding, in conjunction with its holding regarding the enforceability of releases to bar a later *qui tam* action, will have the practical effect of silencing thousands of potential whistleblowers who, when they sign a boilerplate release in the process of obtaining severance pay, thereby sign away their power to supplement the enforcement of the FCA by bringing a *qui tam* action against their former employer.

CONCLUSION

The petition for writ of certiorari should be granted.

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Entered March 24, 2010

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1202

UNITED STATES OF AMERICA, STATE OF DELAWARE, COMMONWEALTH OF VIRGINIA, STATE OF CALIFORNIA, STATE OF HAWAII, STATE OF NEVADA, STATE OF TENNESSEE, STATE OF ILLINOIS, STATE OF NEW HAMPSHIRE, DISTRICT OF COLUMBIA, STATE OF FLORIDA, STATE OF MASSACHUSETTS, STATE OF TEXAS, STATE OF LOUISIANA ex rel. MARK RADCLIFFE,
Plaintiff-Appellant,

v.

PURDUE PHARMA L.P.; PURDUE PHARMA, INCORPORATED,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Amicus Curiae.

No. 09-1244

UNITED STATES OF AMERICA, STATE OF DELAWARE, COMMONWEALTH OF VIRGINIA, STATE OF CALIFORNIA, STATE OF HAWAII, STATE OF NEVADA, STATE OF TENNESSEE, STATE OF ILLINOIS, STATE OF NEW HAMPSHIRE, DISTRICT OF COLUMBIA, STATE OF FLORIDA, STATE OF MASSACHUSETTS, STATE OF TEXAS, STATE OF LOUISIANA ex rel. MARK RADCLIFFE,
Plaintiff-Appellee,

v.

PURDUE PHARMA L.P.; PURDUE PHARMA, INCORPORATED,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Amicus Curiae.

Appeals from the United States District Court for the Western District of Virginia, at Abingdon. James P. Jones, Chief District Judge. (1:05-cv-00089-jpj-pms)

Argued: January 27, 2010
Entered: March 24, 2010

Before TRAXLER, Chief Judge, AGEE, Circuit Judge, and Catherine C. BLAKE, United States District Judge for the District of Maryland, sitting by designation

Affirmed by published opinion. Judge Agee wrote the opinion, in which Chief Judge Traxler and Judge Blake joined.

COUNSEL

ARGUED: Mark Tucker Hurt, Abingdon, Virginia, for Appellant/Cross-Appellee. Jennifer O'Connor, WILMERHALE, Washington, D.C., for Appellees/Cross-Appellants. Henry Charles Whitaker, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae. **ON BRIEF**: Paul Wakefield Roop, II, ROOP LAW OFFICE, LC, Beckley, West Virginia, for Appellant/Cross-Appellee. Howard M. Shapiro, Kimberly A. Parker, Christopher E. Babbitt, Robert A. Mays, WILMERHALE, Washington, D.C., for Appellees/Cross-Appellants. Tony West, Assistant Attorney General, Beth S. Brinkmann, Deputy Assistant Attorney General, Michael S. Raab, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

OPINION

AGEE, Circuit Judge:

The plaintiff-relator, Mark Radcliffe ("Radcliffe"), filed a *qui tam* suit in the United States District Court for the Western District of Virginia alleging that his former employer, Purdue Pharma, L.P. ("Purdue"), defrauded the government by marketing its pain-relief drug, OxyContin, as a cheaper alternative to the drug it replaced, MS Contin, which was also manufactured by Purdue. Radcliffe alleged that Purdue, through its sales agents and marketing materials, falsely claimed to physicians that OxyContin was less expensive than its predecessor,

MS Contin, because the "2:1 equianalgesic ratio between OxyContin and MS Contin . . . ma[de] OxyContin twice as potent and, as a result, cheaper per dose than MS Contin." J.A. 438. Radcliffe's suit alleged violations of the federal False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), as well as violations under various analogous state statutes.[1]

While the complaint was under seal pursuant to the procedures outlined in the FCA, Radcliffe filed three separate amended complaints before serving the Third Amended Complaint on Purdue. Purdue then moved to dismiss on three grounds: (1) bar and release, (2) the public disclosure bar, and (3) the failure to satisfy Federal Rule of Civil Procedure

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[1] Congress enacted the [FCA] "during the Civil War in response to overcharges and other abuses by defense contractors, . . . [with the expectation that it] would help the government uncover fraud and abuse by unleashing a posse of *ad hoc* deputies to uncover and prosecute frauds against the government." *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 582 F.3d 292, 298 (4th Cir. 2008) (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)). "The FCA imposes civil liability (including treble damages and a fine of up to $10,000) on persons who knowingly submit false claims to the government for payment or conspire to use false claims to obtain payment from the government." *Id.* at 298-99 (citing 31 U.S.C.A. § 3729 (West 2003 & Supp. 2007)).

Private persons, known as "relators", may file FCA suits on the government's behalf. *Id.* at 299; *see* 31 U.S.C. § 3730. Such suits are referred to as "*qui tam*" actions. *Id.*; *see Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n. 1 (2000) ("*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'").

9(b), which requires that allegations of fraud be pled with particularity. The district court allowed limited discovery on the brand release issue but subsequently ruled that a release Radcliffe gave Purdue was ineffective as a ground upon which to grant Purdue's motion to dismiss. The district court did, however, grant the motion to dismiss based on Radcliffe's failure to satisfy the pleading requirements of Rule 9(b). Radcliffe was given 30 days to amend his Complaint and he timely filed a Fourth Amended Complaint. Purdue again moved to dismiss and the district court again granted the motion for failure to satisfy the strict pleading requirements of Rule 9(b). The district court also dismissed the state law claims for failing to plead fraud with particularity and denied Radcliffe leave to file a Fifth Amended Complaint.

Radcliffe now appeals the district court's grant of the motion to dismiss and the denial of leave to amend. Purdue cross-appeals, asserting that the district court erred in refusing to enforce the "Agreement and General Release" Radcliffe signed on August 1, 2005 ("the Release"), prior to filing the *qui tam* suit. For the reasons that follow, we agree with Purdue that the district court erred in refusing to enforce the Release.[2]

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[2] Because the Release is a complete bar to Radcliffe's claims, there is no need to address Radcliffe's arguments on the Rule 9(b) dismissal nor the district court's denial of leave to amend.

I. Background and Proceedings Below

A. Radcliffe's Communications with Purdue and the Government

The district court determined that between 1996 and 2005 Radcliffe, on behalf of Purdue, marketed "OxyContin to individual physicians and became familiar with Purdue's marketing claims about OxyContin's relative cost and potency, including the claim that there is a 2:1 equianalgesic ratio between OxyContin and MS Contin." *United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 582 F. Supp. 2d 766, 774 (W.D. Va. 2008). During this period, Radcliffe was employed by Purdue as a district sales manager, directly marketing Purdue products like OxyContin to physicians. The district court found that some physicians were skeptical of the claimed 2:1 ratio, but Radcliffe's supervisor reassured Radcliffe that it was correct. *Id.* Despite these assurances, Radcliffe sought independent legal advice in 2004 about the OxyContin claims. *Id.*

In January 2005, using the alias "John Femaledeer," Radcliffe sent an email to a Purdue director and to Purdue's General Counsel offering to settle a "'whistleblower' suit against Purdue for fraud based on 'deceptive pharmacology'". In a subsequent email "John Femaledeer" (Radcliffe) sought to "settle" his *qui tam* claims with Purdue if the company would invest $40 million in his business startup project. Purdue rejected the offer.

Around that same time Radcliffe anonymously contacted an Assistant United States Attorney for the Western District of Virginia to determine whether there was any interest in a claim against Purdue, but did not reveal the particulars of his

claims during those discussions. *Radcliffe*, 582 F. Supp. 2d at 774. The district court determined it was "undisputed that Radcliffe did not disclose the nature of his *qui tam* allegations to the government prior to the filing of his Complaint" on September 27, 2005. *Id.* at 775.[3]

B. The Government's Investigation of Purdue

The government had been investigating Purdue prior to the filing of Radcliffe's suit. According to a declaration executed by an Assistant United States Attorney, "one area of investigation concern[ed] whether Purdue falsely marketed OxyContin as being twice as potent as morphine and, accordingly, less expensive than MSContin." *Id.* at 775. In the same declaration, the Assistant United States Attorney stated that "the 2:1 comparison of OxyContin to MSContin [sic] [wa]s one of the areas under investigation." *Id.* "Beginning in 2002 and continuing for the next several years, the government sought millions of documents from Purdue and conducted hundreds of interviews, some of which pertained to the relative potency and cost of OxyContin and MS Contin." *Id.*

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[3] Radcliffe's theory of liability under the FCA is that Purdue defrauded the government by misleading physicians about the potency and cost savings of OxyContin. Purdue's alleged fraudulent marketing, in turn, caused physicians to prescribe OxyContin to patients when MS Contin would have sufficed. Because MS Contin was actually cheaper, Radcliffe asserts that each time Medicare, Medicaid or another government program (Veterans' benefits for example) paid for a prescription of the higher priced OxyContin induced by Purdue's fraudulent marketing, the government paid a "false claim" subject to the FCA.

On June 24, 2005, an attorney representing several Purdue employees spoke with a lawyer from the Department of Justice regarding topics to be discussed during those employees' grand jury testimony. *Id.* The Justice Department attorney indicated that she intended to (and subsequently did) ask the employees "about the dispute over the relative potency of OxyContin and MS Contin, among other topics, explaining that this related to the marketing and cost implications of the relative potencies." *Id.* Around that same time, the government began drafting a subpoena that "included requests for all documents discussing relative analgesic potency or safety of OxyContin and MS Contin." *Id.* Other documents under seal also reflect that prior to the filing of Radcliffe's suit, the government had made an additional request for the identity of "the author and source of different versions of a document . . . already in the government's possession" that questioned the 2:1 ratio between MS Contin and OxyContin. *Radcliffe*, 582 F. Supp. 2d at 775.

The government's investigation of Purdue's marketing claims continued after Radcliffe's execution of the Release. Indeed, on August 2, 2005, the day after Radcliffe signed the Release, the government subpoenaed Radcliffe to testify before the grand jury. *Id.* at 776. In September 2005, the Department of Justice provided Purdue's counsel with electronic search terms designed to identify documents pertaining to the potency/cost issue. *Id.*

Radcliffe filed his *qui tam* suit on September 27, 2005.[4]

On May 7, 2007, the government filed a notice that it would not intervene in the *qui tam* suit filed by Radcliffe. Two days later,

> the government filed a criminal information against a related Purdue entity and several Purdue executives, along with executed plea agreements for all the criminal defendants. Although the criminal charges did relate to the misbranding of OxyContin, these charges focused on Purdue's marketing of OxyContin as "less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications."

Id. (quoting Information ¶ 20, *United States v. Purdue Frederick Co.*, No 1:07-CR-00029 (W.D. Va.)). The misbranding charges did not pertain to the 2:1 ratio and although the plea agreements settled certain civil claims by the government, they did not address the claims made in the *qui tam* suit. *Radcliffe*, 582 F. Supp. 2d at 776.

C. Execution of the Release

In late June 2005, as part of a workforce restructuring that substantially reduced Purdue's sales force, Radcliffe was offered the option of transferring to a new position or accepting a severance package. Radcliffe opted to leave Purdue

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[4] On December 5, 2005, the government filed a motion to stay Radcliffe's *qui tam* suit, arguing, *inter alia*, that allowing the suit to move forward would reveal, publicly, a portion of the grand jury's investigation. *Id.* The district court granted the stay and the government's investigation continued.

and, in exchange for his execution of the Release, he was given an enhanced benefits package to which he would not otherwise have been entitled, including more than $40,000 in salary payments. The Release, signed by Radcliffe on August 1, 2005, included the following relevant provisions:

> 4. (a) Employee . . . knowingly and voluntarily releases and forever discharges [Purdue] of and from any and all liability to Employee for actions or causes of action, suits, claims, charges, complaints, contracts (whether oral or written, express or implied from any source), and promises, whatsoever, in law or equity, which, Employee . . . ever had, may now have or hereafter can, shall or may have against [Purdue] as of the date of the execution of this Agreement, including all unknown, undisclosed and unanticipated losses, wrongs, injuries, debts, claim or damages to [Radcliffe], for, upon, or by reason of any matter, cause or thing whatsoever.
>
> 5. To the maximum extent permitted by law, Employee agrees that Employee will not seek and waives any right to accept any relief or award from any charge or action against [Purdue] before any federal, state, or local administrative agency or federal, state or local court whether filed by Employee or on Employee's behalf with respect to any claim or right covered by paragraph 4.
>
> 16. THE PARTIES HAVE READ AND FULLY CONSIDERED THE AGREEMENT AND ARE MUTUALLY DESIROUS OF ENTERING INTO SUCH AGREEMENT.

> THE TERMS OF THIS AGREEMENT ARE THE PRODUCT OF MUTUAL NEGOTIATION AND COMPROMISE BETWEEN EMPLOYEE AND THE COMPANY. EMPLOYEE ACKNOWLEDGES THAT EMPLOYEE (i) HAS HAD AT LEAST FORTY FIVE (45) DAYS TO CONSIDER THIS AGREEMENT. . . (ii) HAS CAREFULLY READ THE AGREEMENT AND THE DISCLOSURE STATEMENT IN THEIR ENTIRETY; (iii) HAS BEEN ADVISED IN WRITING TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTION OF THIS AGREEMENT; . . . (v) HAS DISCUSSED IT WITH INDEPENDENT LEGAL COUNSEL, OR HAS HAD A REASONABLE OPPORTUNITY TO DO SO . . . . HAVING ELECTED TO EXECUTE THIS AGREEMENT, TO FULFILL THE PROMISES SET FORTH HEREIN, EMPLOYEE FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION, ENTERS INTO THIS AGREEMENT INTENDING TO WAIVE, SETTLE AND RELEASE ALL LIABILITY FOR AND RECOVERY FROM CLAIMS EMPLOYEE EVER HAD, NOW HAS OR MIGHT HAVE AGAINST THE COMPANY AS OF THE DATE OF THIS AGREEMENT.

J.A. 134-35, 140-41.

D. Proceedings in the District Court

In response to Radcliffe's Third Amended Complaint, Purdue moved to dismiss, arguing in part that the Release was a complete bar to

Radcliffe's suit. To analyze the enforceability of the Release, the district court applied "the framework established by the Ninth Circuit in *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995), and *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997)." *Radcliffe*, 582 F. Supp. 2d at 777. Characterizing *Hall* as "an exception to the general rule against enforcing pre-filing releases to bar subsequent *qui tam* suits," *id.* at 779, the district court determined that "the critical issue [was] the completeness of the government's knowledge or the fullness of its investigation." *Id.* According to the district court, "[p]artial knowledge or investigation on the part of the government is insufficient to remove a case from the purview of *Green* into the exception created by *Hall*." *Id.* at 780. Therefore, even though "the government was aware of the substance of Radcliffe's allegations and had begun, but not completed, its investigation of these allegations as of the date of the Release," *id.* at 781, Radcliffe's ability "to supplement federal enforcement of the FCA by prosecuting these allegations on behalf of the government remains." *Id.* at 782.

Accordingly, the district court determined

> [t]he circumstances here fall within the general rule articulated in *Green* that pre-filing releases are unenforceable to bar subsequent *qui tam* actions, rather than the *Hall* exception, because the government had not fully investigated the substance of Radcliffe's allegations. Further, the public policy concerns raised by Purdue do not alter the relative balance of public interests under

> the *Rumery* test. The general release executed by Radcliffe does not bar this action.

Id. at 783.

In response to the Fourth Amended Complaint, Purdue renewed its claim of bar by virtue of the Release. However, the district court did not address the Release issue because it again granted Purdue's motion to dismiss on the grounds that Radcliffe's pleading failed under Rule 9(b). Purdue has properly preserved the issue concerning enforcement of the Release by filing a timely cross-appeal under Rule 4(a)(3) and we have jurisdiction pursuant to 28 U.S.C. § 1291.

II. Standard of Review

The district court's order denied Purdue's motion to dismiss based on the Release. However, Purdue contends, and Radcliffe apparently agrees, that the district court actually granted summary judgment to Radcliffe pursuant to Rule 56(c) on the Release issue.

> It is well settled that district courts may convert a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment, allowing them to assess whether genuine issues of material fact do indeed exist. While it may be preferable for a district court to trigger this conversion explicitly, appellate courts may take the district court's consideration of matters outside the pleadings to trigger an implicit conversion of a Rule 12(b)(6) motion to one under Rule 56. The ability of appellate courts to perform this conversion *sua sponte* serves judicial economy

> . . . by sparing the district court an unnecessary remand. As the Supreme Court has noted: "It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."

Bosiger v. U.S. Airways, Inc., 510 F.3d 442, 450 (4th Cir. 2007) (internal citations omitted) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)); *see also Herbert v. Saffell*, 877 F.2d 267, 270 (4th Cir. 1989) (treating Rule 12(b)(6) motion as motion for summary judgment); *George v. Kay*, 632 F.2d 1103, 1106 (4th Cir. 1980) ("If it is necessary for the court to look beyond the pleadings, the 12(b)(6) motion must be converted into a motion for summary judgment and all parties must be given the opportunity to present materials pertinent to such a motion."). In this case the parties provided evidence and thoroughly briefed the Release issue to the district court, which clearly relied on the declarations and other exhibits presented when determining that the Release did not bar Radcliffe's *qui tam* suit. The parties have also relied on evidence relevant to the Release issue in their briefs submitted to this Court. The facts in the record appear to be generally undisputed and we therefore find it proper to convert Purdue's "Rule 12(b)(6) motion to one under Rule 56" and thus consider the district court's ruling on that basis.

III. Analysis

Upon his departure from Purdue, and in exchange for a considerable sum of money and other

benefits to which he would not otherwise have been entitled, Radcliffe signed the Release, an exceedingly broad document. In the Release, Radcliffe agreed to "forever discharge[ ] [Purdue] of and from any and all liability *to Employee* for actions or causes of action, suits, [or] claims . . . whatsoever, in law or equity, which, Employee . . . ever had, may now have or hereafter, can, shall or may have against [Purdue] as of the date of the execution of this Agreement . . . ." J.A. 134-35 (emphasis added). Radcliffe "enter[ed] into this agreement intending to waive, settle and release all liability for and recovery from claims [he] ever had, now has or might have against the company as of the date of this agreement." J.A. 141. Finally, he "waive[d] any right to accept any relief or award from any charge or action against [Purdue] before any . . . federal, state or local court . . . ." J.A. 136.

The FCA clearly provides that once a *qui tam* action is filed, the relator and the defendant may not settle (or at least may not voluntarily dismiss) the action. 31 U.S.C. § 3730(b)(1). The statute does not, however, address whether the relator's release of *qui tam* claims, executed before the filing of a complaint, is enforceable.

Purdue asserts that prefiling releases are presumptively enforceable and that enforcing such agreements in FCA cases is no different than what is done routinely in other cases involving "civil rights, antitrust, securities fraud, and RICO claims" where private enforcement deters conduct detrimental to the public. Br. of Appellee at 38. According to Purdue, "private *qui tam* suits are a hallmark of FCA enforcement. . . . The government, and other private individuals, remain free to prosecute

released claims." *Id.* at 40. In Purdue's view, enforcing the Release in this case upholds a number of important public policies, such as encouraging settlement, enforcing the sanctity of contract, supporting the use of general releases in the employment context, preventing unjust enrichment, and discouraging duplicity among contracting parties.

Radcliffe opposes enforcement of the Release, arguing that *qui tam* claims belong to the government, not the relator. In Radcliffe's view, he had no individual legally cognizable claim to release as of August 1, 2005 (the date he signed the Release) because he only became a partial assignee of the government's claim upon filing the complaint, not before. He further contends that, to be effective, "any release purporting to settle . . . *qui tam* claims and bar a *qui tam* action . . . must have the express consent of the Attorney General." Response and Reply Br. of Appellant at 42. Finally, he argues that enforcing prefiling releases undermines the purposes of the FCA.

The government, as amicus curiae, advances a somewhat middle-ground position in which it asserts that although pre-filing releases should generally be considered unenforceable, the district court "should have enforced the Release in this case." Amicus Br. at 3. This is so, the government argues, "because the relator's allegations of fraud were disclosed to the government independent of the filing of the *qui tam* action itself." *Id.* The government proposes adoption of a rule making an "FCA *qui tam* release[ ] . . . enforceable if the government has knowledge of the relator's allegations of fraud independent of the filing of the *qui tam* action itself." Amicus Br. at 12.

This "government knowledge exception," the government argues, comports with the purposes of the FCA because it vindicates the public interest and simultaneously promotes "the orderly and efficient private resolution of FCA cases." Amicus Br. at 14.

Radcliffe, Purdue and the government agree that the enforceability of the Release should be evaluated using the test applied by the Supreme Court in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). In *Rumery* the Supreme Court reiterated the well-established rule that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[5] *Id.* at 392.

A. Radcliffe's general release of claims did not require the government's consent to be effective.

As an initial matter, we do not accept Radcliffe's assertion that the Release was ineffective because the Attorney General did not "sign off" on it. In *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1168 (10th Cir. 2009), the United States Court of Appeals for the Tenth Circuit rejected this same argument. We agree with that court's analysis.

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[5] As the district court correctly noted, we have not interpreted *Rumery* in the context of the FCA, though we have stated that "public policy is implicated only where 'it is explicit, well defined and dominant, and ascertainable by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Radcliffe*, 582 F. Supp. 2d at 778 n.9 (quoting *L & E Corp. v. Days Inns of Am., Inc.*, 992 F.2d 55, 58 (4th Cir. 1993)).

The FCA provides that

> [a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

31 U.S.C.A. § 3730(b)(1) (West 2003); *see, e.g.*, *Webster v. United States*, 217 F.3d 843 at *1 (4th Cir. 2000) (Table) ("with the government's consent" relator "voluntarily dismissed her *qui tam* action without prejudice"). As the Tenth Circuit explained:

> [t]he statute itself only mentions the "dismissal" of a *qui tam* action and further requires the consent of the court. When there is a release preceding the filing of the *qui tam* action, as in this case, no action has been filed, so there is neither an action to dismiss nor a judge to consent to the agreement. As a consequence, the statute only governs the enforceability of settlement agreements made after the filing of a *qui tam* claim.

Ritchie, 558 F.3d at 1168 (citing *Green*, 59 F.3d at 960).

Section 3130(b)(1) manifests Congress' express intent to prohibit a relator's unilateral settlement of FCA claims, absent the government's consent, once a suit has been filed. If Congress specifically intended to preclude a relator from releasing his claims only with the Attorney General's consent prior to filing suit, it could have done so, but did not. "We do not

lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . . ." *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005). Thus, the consent of the government is not a necessary condition precedent to enforcement of an otherwise valid release where such a release is executed prior to filing a *qui tam* action.

B. Radcliffe possessed a legally cognizable claim subject to the terms of the Release.

Radcliffe next argues that the plain language of the Release does not encompass his *qui tam* claims against Purdue. Specifically, in paragraph 4 he released Purdue from "*all liability to Employee* for . . . claims . . . which Employee . . . ever had, may now have or hereafter can, shall or may have . . . *as of the date of the execution of this Agreement* [August 1, 2005]." Response and Reply Br. of Appellant at 54. Radcliffe asserts that as of the date the Release was executed, he had no FCA claim against Purdue. As support for this proposition, he relies on the Supreme Court's statement in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000), that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim." In Radcliffe's view, no such assignment occurred until he filed his complaint under seal with the district court, which occurred after he signed the Release. We disagree.

In *Vermont Agency*, the Supreme Court explained the three elements necessary to establish Article III standing. First, a plaintiff must establish that he suffered an "'injury in fact' . . . that is both

'concrete' and 'actual or imminent, not conjectural or hypothetical.'" 529 U.S. at 771 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "Second, he must establish causation—a 'fairly . . . trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant." *Vermont Agency*, 529 U.S. at 771 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)). Finally, "he must demonstrate redressability — a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Vermont Agency*, 529 U.S. at 771 (quoting *Simon*, 426 U.S. at 45). Noting that in *qui tam* cases it is the government and not the relator that has sustained the injury in-fact, the *Vermont Agency* Court held that a relator nonetheless possesses Article III standing to bring an FCA claim "because the [FCA] 'effect[s] a partial assignment of the Government's damages claim' and that assignment of the 'United States' injury in fact suffices to confer standing on [the relator].'" *Sprint Commc'ns Co. v. APCC Servs., Inc.*, ___ U.S. ___, 128 S. Ct. 2531, 2542 (2008) (quoting *Vermont Agency*, 529 U.S. at 773, 774). Thus, an "adequate basis for the relator's suit for *his bounty* is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Vermont Agency*, 529 U.S. at 773 (emphasis added).

In the course of its analysis the Supreme Court further explained

> that the statute gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery. Thus, [the statute] provides that "[a] person may bring a civil action for a violation of section

3729 *for the person and for the United States Government*," § 3730(b).

Id. at 772.

According to Radcliffe's own allegations, the government suffered an "injury-in-fact" caused by Purdue's deceptive marketing of OxyContin's 2:1 equianalgesic ratio from 1995 to 2005. Thus, once the government suffered an injury (and Radcliffe became aware of the fraud causing the injury), Radcliffe had a statutory claim, and the necessary legal standing as partial assignee, to file a *qui tam* lawsuit.[6],[7]

In short, he had "an interest in the lawsuit" regardless of when he opted to vindicate it.[8] The fact that Radcliffe chose not to file suit until after signing the Release does not negate the fact that he had the

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[6] Indeed, Radcliffe's attempts to settle his claims with Purdue in early 2005, via anonymous emails, indicates that even he understood that he had an FCA claim well before he signed the Release.

[7] We note that the elements of causation and redressability are not, in the context of Racliffe's allegations, at issue. Clearly, Radcliffe has alleged that the "cause" of the fraud was Purdue's marketing practices prior to his execution of the Release. There is also no doubt that, if violations of the FCA were eventually proven, monetary damages would be the appropriate remedy.

[8] This is not to say that Radcliffe possessed an indefinite, indefeasible claim. For example, another relator alleging the same fraudulent conduct could have preempted Radcliffe's suit or Radcliffe could have let the statute of limitations expire. *See* 31 U.S.C. § 3730(b)(5) (barring a relator from bringing "a related action based on the facts underlying [a] pending action"). The Release, of course, did not prohibit the government or another relator from pursuing similar claims against Purdue.

right to file suit beforehand – a right he waived under the terms of the Release. *See* 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1545, pp. 351-353 (2d ed. 1990) ("[W]hen there has been . . . a partial assignment the assignor and the assignee each retain an interest in the claim and are both real parties in interest."). Because Radcliffe possessed a presently enforceable claim at the time he signed the Release, the plain terms of the Release encompassed *his* FCA claims.

C. The Government's Knowledge

Having determined that Radcliffe's FCA claims were encompassed by the terms of the Release and that the Attorney General's consent to the Release was unnecessary, we next address, in a *Rumery* context, whether overriding public policy considerations nonetheless prevent enforcement of the Release. We hold that they do not under the facts of this case.

Most courts considering the enforceability of releases executed prior to filing an FCA suit, including the district court in this case, apply the analytical framework established by the Ninth Circuit in *Green* and *Hall*. *See, e.g.*, *Ritchie*, 558 F.3d at 1169; *United States ex rel. McLean v. County of Santa Clara*, No. C05-01962, 2008 WL 1947015 (N.D. Cal. Apr. 30, 2008); *U.S. ex rel. El-Amin v. George Washington Univ.*, No. 95-2000, 2007 WL 1302597 (D.D.C. May 2, 2007); *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 481 F. Supp. 2d 815 (S.D. Tex. 2007); *United States ex rel. Bahrani v. ConAgra, Inc.*, 183 F. Supp. 2d 1272 (D. Colo. 2002).

Green involved an employee who, during his tenure with a defense contractor, alleged that the company "had 'double charged' the U.S. Air Force for equipment procured for the B-2 bomber program" and that he had been discharged for raising the overcharges with company officials. *Green*, 59 F.3d at 956. Green filed suit against his former employer, asserting various state-law claims arising out of his termination. *Id.* The parties eventually reached a settlement and Green signed a general release resolving "all of the matters which [had] arisen between them including but not limited to disputes relating to or arising out of the [lawsuit] and Green's employment with and separation from" the company. *Id.* Green subsequently filed a *qui tam* suit against his former employer alleging fraudulent conduct subject to the FCA.

The Ninth Circuit concluded "that enforcing the release . . . would impair a substantial public interest" and declined to enforce Green's release. *Id.* at 963. The court deemed it "critical" to its analysis, however, "that the government only learned of the allegations of fraud and conducted its investigation *because of the filing of the qui tam complaint.*" *Green*, *id.* at 966. After considering additional interests favoring enforcement, the *Green* Court determined "that application of the *Rumery*[ ] test compels the conclusion that prefiling releases of *qui tam* claims, when entered into without the United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim." *Id.* at 969.

A few years after its decision in *Green*, the *en banc* Ninth Circuit upheld a prefiling release in *Hall* because, contrary to the facts in *Green*, "the government had full knowledge of the . . . charges

and had investigated them before" the relator and the defendant settled. *Hall*, 104 F.3d at 231. In *Hall*, the court specifically stated that its "refusal to enforce the release in *Green* turned on the public interest in learning about claims of government contractor fraud, and upon the fact that in that case, the government had not been aware of [the relator's] allegations at the time of the settlement release." *Id.* at 233. But because the government was aware of and had investigated the claims raised by the relator in *Hall*, "the public interest in having information brought forward that the government could not otherwise obtain [was] not implicated." *Id.*

> In *Green* and *Hall*, the Ninth Circuit focused heavily upon the federal interest in the disclosure of fraud. In *Green*, the government had no knowledge of the fraud prior to the filing of the *qui tam* suit, while in *Hall* the government had already been apprised of the allegations due to prior disclosures [by the defendant] to a federal agency.

Ritchie, 558 F.3d at 1170.

Purdue asserts that independent of any contribution from Radcliffe, the government's long-standing investigation of Purdue's marketing of OxyContin had specifically come to include the precise focus of Radcliffe's suit: "'whether Purdue falsely marketed OxyContin as being twice as potent . . . and, accordingly, less expensive than MSContin [sic] and the accuracy of 'the 2:1 comparison of OxyContin to MSContin [sic].'" *Radcliffe*, 582 F. Supp. 2d at 781. Purdue points out that not only did the government already have access to the

documents Radcliffe would subsequently attach to his complaint, it also had high-level documents to which Radcliffe would not have had access as an employee. This is not, therefore, a suit based on information that was otherwise unavailable to the government. As such, Purdue argues, this is not a case where public policy precludes enforcement of the Release.

Radcliffe argues that for the *Hall* exception to apply, and thus for the Release to be enforceable, the government must (1) have known the substance of the relator's allegations, and (2) have *fully* investigated them by the time a release was signed. Radcliffe asserts that in refusing to enforce the Release, the district court correctly focused on the fact that the government "had begun, but not completed, its investigation of these allegations as of the date of the release." *Id.* at 781.

The government, as amicus, contends the Release should be enforced in this case because the government's knowledge of a relator's allegations of fraud vindicates the public interest goals of the FCA. The government asserts that such a "government knowledge" rule combats any attempt by defendants to buy relators' silence and encourages defendants' disclosure of fraud and cooperation with investigations. The government contends that by relying on the fact that it "had not *fully* investigated the substance of Radcliffe's allegations," *id.* at 783 (emphasis added), the district court erroneously applied the *Green/Hall* analysis. This is so, the government argues, because the district court's reasoning overlooks the primary purpose of requiring disclosure of fraud allegations, "which is not to ensure that the government exhaustively

investigates and prosecutes every allegation of fraud, but rather that it has an adequate *opportunity* to do so." Amicus Br. at 16. According to the government, giving conclusive weight to the completeness of its investigation as a condition of enforcing an FCA release could lead to an inappropriate, time-consuming, and amorphous inquiry into the government's internal investigative deliberations and processes. Moreover, such a "completed investigation rule" contradicts 31 U.S.C. § 3730(b)(2), which grants the government discretion under the FCA to initiate or participate in an FCA action without precondition.

The district court identified several interests to be considered when enforcing a release of *qui tam* claims, including "the public interest in having relators disclose inside information of alleged fraud to the government, in having relators supplement federal enforcement of the FCA by assisting the government in its investigation and prosecution or prosecuting the claim itself, and in deterring future fraud against the government." *Radcliffe,* 582 F. Supp. 2d at 782. The district court acknowledged that "the government [learned] of the substance of Radcliffe's allegations independently and was interested enough in them to request documents pertaining to and question various Purdue employees about the relative cost and potency issue." *Id.* Noting that the government's investigation eventually went "in a different direction" and the final settlement did not refer to the issue raised by Radcliffe, the district court ultimately concluded that Radcliffe's continued "ability to supplement federal enforcement of the FCA by prosecuting these allegations" best served the public interest. *Id.* The

district court "believe[d] that enforcing the release under these circumstances would substantially impact important public interests associated with the FCA," *id.*, and that "the fullness of [the government's] investigation" was a necessary condition precedent to the enforceability of a release. *Id.* at 779-80. We disagree.

The Tenth Circuit recently addressed analogous issues and determined that "[b]ecause the federal interests served by enforcing releases signed after disclosure to the federal government outweigh the interests served by not enforcing them, . . . the releases [were] enforceable." *Ritchie*, 558 F.3d at 1163. In *Ritchie*, the defendant self-reported fraud to the government, which conducted its own audit and investigation. *Id.* The relator assisted the government in its investigation but subsequently settled claims that the company retaliated against her "because of her whistleblowing activities." *Id.* at 1165. As a result of the settlement, in which she agreed to leave the company, the relator signed two releases purporting to waive "any and all claims [she] might have under federal, state or local law." *Id.* Ten days after signing the second release she filed a *qui tam* action against her former employer. *Id.*

Despite the relator's contentions that "the government lacked full knowledge of the scope of the fraud at the time she signed the release," *id.* at 1170, the Tenth Circuit affirmed the district court's enforcement of the release. In doing so, the court of appeals determined that "[t]he disclosures to the government in this case were sufficient to satisfy the public interest in uncovering fraud." *Id.* According to the court of appeals, "[e]nforcing releases of *qui tam*

claims only when the allegations of fraud have been disclosed to the government before the release . . . has the benefit of encouraging voluntary disclosure by government contractors." *Id.*

In *Ritchie*, "the federal government had not issued its final audit report when the settlement was reached or the *qui tam* suit was filed." *Id.* at 1171. Accordingly, the circuit court recognized, as did the district court in this case, that under such circumstances an interest in having private citizens supplement federal enforcement remains, but "[o]n balance . . . that interest does not outweigh the federal interests served by enforcement of settlements following disclosure of fraud allegations to the government, namely the interest in disclosure of fraud allegations and the interest in encouraging settlement." *Id.*

This is so, in part, because

> [c]ontractors . . . have an interest in settling *qui tam* claims prior to the filing of a lawsuit. If they can settle *qui tam* claims only after fraud allegations have been disclosed to the government, then contractors effectively have an incentive to disclose. On policy grounds, then, conditioning the enforceability of releases of *qui tam* claims upon the prior disclosure of the fraud allegations to the government promotes the federal interest in uncovering fraud against the government.

Id. at 1170. Enforcing prefiling releases also encourages the settlement of disputes.[9] *See Crandell v. United States*, 703 F.2d 74, 75 (4th Cir. 1983) ("Public policy, of course, favors private settlement of disputes.").

When the government is unaware of potential FCA claims the public interest favoring the use of *qui tam* suits to supplement federal enforcement weighs against enforcing prefiling releases. But when the government is aware of the claims, prior to suit having been filed, public policies supporting the private settlement of suits heavily favor enforcement of a prefiling release. We therefore agree with the government that "[t]he proper focus of the inquiry is whether the allegations of fraud were sufficiently disclosed to the government, not on whether the government's investigation was complete." Amicus Br. at 17. We find that application of this "government knowledge" rule meets the balancing analysis required under *Rumery*. Thus, we concur with the Tenth Circuit that when, as in this case, the government was aware, prior to the filing of the *qui tam* action, of the fraudulent conduct represented by the relator's allegations, the public interest has been served and the Release should be enforced.

Accordingly, because the "allegations of fraud were sufficiently disclosed to the government" prior to Radcliffe's filing of the *qui tam* suit, the district

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[9] The government also points out that if it has knowledge of the alleged fraud, "[s]uch . . . knowledge . . . reduces the perverse incentive a *qui tam* defendant would otherwise have to buy the silence of relators, because that defendant faces the real threat of an independent government action." Amicus Br. at 13.

court erred in failing to enforce the Release as a bar to Radcliffe's claims.

IV. Conclusion

Although we conclude that the district court erred in its decision not to enforce the Release, we nonetheless affirm the judgment dismissing Radcliffe's suit with prejudice. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("[T]he decision of a lower court . . . must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason . . . . It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground . . . ." (internal quotation marks omitted)); *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 222 (4th Cir. 2002) (observing that we "can affirm on any basis fairly supported by the record").

Accordingly, the judgment of the district court will be affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES, ET AL.,
EX REL. MARK RADCLIFFE,
Plaintiffs,

v.

PURDUE PHARMA L.P., ET AL.,
Defendants.

Case No. 1:05CV00089

OPINION

Entered: October 14, 2008

By: James P. Jones
Chief United States District Judge

Mark T. Hurt, Abingdon, Virginia, and Paul W. Roop, II, Beckley, West Virginia, for Mark Radcliffe; Howard M. Shapiro and Jennifer M. O'Connor, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., and Howard C. McElroy, McElroy, Hodges, & Caldwell, Abingdon, Virginia, for Purdue Pharma L.P. and Purdue Pharma, Inc.

In this *qui tam* action, the defendants have moved to dismiss on several grounds, including the jurisdictional bar based on prior public disclosures of the alleged false claims, the execution of a pre-filing general release by the relator, and a failure to plead fraud with particularity under Rule 9(b). For the

reasons set forth below, I deny the former two grounds of dismissal, but I will grant the motion under Rule 9(b), with leave to amend.[1]

I. BACKGROUND.

In this action brought under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C.A. §§ 3729-3733 (West 2003 & Supp. 2008), and analogous state statutes, the relator Mark Radcliffe alleges that the defendants, Purdue Pharma, L.P. and Purdue Pharma, Inc. (collectively, "Purdue"), misrepresented to physicians the relative potency of Purdue's controlled-released, oxycodone-based pain medication, OxyContin, which resulted in federal and state agencies, such as Medicaid, paying more than was necessary in reimbursement. Radcliff is a former sales representative and manager at Purdue, who left its employment shortly before he filed the present suit.

This action was stayed for some time at the request of the federal government, which eventually declined to intervene, along with all of the thirteen state governments named in the Complaint.[2] Purdue

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[1] Certain sealed material has been redacted from the publicly released copy of this opinion. Redactions are denoted in brackets. The parties have been provided with the sealed copy.

[2] Radcliffe initially filed his Complaint, disclosing his allegations to the government, on September 27, 2005. The case was stayed for over a year and a half until the government declined to intervene on May 8, 2007. During this time the government was conducting a criminal investigation of Purdue's marketing of OxyContin, eventually resulting in guilty pleas in this court by a related company and three of Purdue's top executives. *See United States v. Purdue Frederick*

then filed the present Motion to Dismiss, seeking a dismissal on the grounds that Radcliffe's claims are based on publicly disclosed information rather than information he discovered; that Radcliffe has released Purdue from the claims; and that the Complaint fails to adequately allege fraud as required by Federal Rule of Civil Procedure 9(b).[3]

As to the defense that Radcliffe had released Purdue from the claims, I decided to treat the Motion to Dismiss as one for summary judgment in accord with Federal Rule of Civil Procedure 12(d). Further limited discovery and briefing was allowed as to that issue.

All of the issues are now ripe for decision and will be discussed sertiam.

II. THE PUBLIC DISCLOSURE BAR.

The FCA provides that there is no subject matter jurisdiction in a case where the claim is

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting

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Co., 495 F. Supp. 2d 569, 576 (W.D. Va. 2007) (accepting plea agreements).

[3] Purdue initially contended that the Complaint failed to state a claim because Radcliffe's allegations merely showed "a scientific dispute . . . regarding the relative potency of oxycodone." (Mem. Supp. Defs.' Mot. Dismiss 20.) Purdue has withdraw that argument, including its related Request for Judicial Notice. (Reply Supp. Defs.' Mot. Dismiss 35.) Because of my disposition of the case, I do not reach Purdue's arguments that some of the claims may be barred by the applicable statute of limitations or that some of state causes of action are procedurally barred.

> Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C.A. § 3730(e)(4)(A). The purpose behind this bar, of course, is to "stifl[e] parasitic lawsuits." *United States ex rel. LaCorte v. Wagner*, 185 F.3d 188, 191 (4th Cir. 1999).

Because the public disclosure bar involves the jurisdiction of the court, it must be determined first, before proceeding to any other questions. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 309 (4th Cir. 2008). In deciding a jurisdictional challenge, the court must determine the facts based on the evidence submitted. *Id.* at 308. The plaintiff has the burden of showing that the court has subject matter jurisdiction. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

The facts on which I have determined jurisdiction are as follows.

In his job marketing OxyContin to physicians, the relator Radcliffe became familiar with claims made by Purdue about the medication's relative cost and potency. Specifically, in his sales representative training, he alleges that he was taught that there was a 2:1 equianalgesic ratio between OxyContin and MS Contin, a rival pain medication containing morphine, making OxyContin twice as potent and, as a result, cheaper per dose than MS Contin. Training materials included this claim and Purdue encouraged sales representatives to emphasize this cost difference when speaking with physicians.

Radcliffe encountered skepticism from physicians he spoke with regarding OxyContin's relative cost and potency. Several of these physicians directed Radcliffe to specific sources in the scientific literature to show that the correct equianalgesic ratio between MS Contin and OxyContin was closer to 1:1, meaning that OxyContin was less potent and more expensive than Purdue claimed. These sources supported an equianalgesic ratio of 1:1 for chronic or around-the-clock dosing, but acknowledged that single dose studies supported the 2:1 ratio. *See* Agency for Health Care Policy & Research, Public Health Serv., U.S. Dept. of Health & Human Servs., *Clinical Practice Guideline: Acute Pain Management: Operative or Medical Procedures and Trauma*, app. C2 (Feb. 1992) ("Clinical Practice Guideline"); *United States Pharmacopeia–Dispensing Information* 2238 tbl. 2 (16th ed 1996) ("USP"); Robert G. Twycross, *Opioids*, in *Textbook of Pain* 943, 953 tbl. 49.7 (Patrick D. Wall & Ronald Mezack eds. 3d ed. 1994) ("Textbook of Pain"). Because MS Contin and OxyContin were designed for chronic dosing, these physicians believed the 1:1 equianalgesic ratio was the appropriate one.

When Radcliffe raised this concern to supervisors, he was told that by approving the OxyContin package inserts, which contained the 2:1 equianalgesic ratio as a starting conversion that could later be adjusted by doctors, the U. S. Food and Drug Administration ("FDA") had approved that ratio. He was also told that Purdue's decision to rely on the 2:1 ratio, despite published articles indicating that the 1:1 ratio was more appropriate for OxyContin's approved use, was based on safety concerns, that is, it was better for doctors to start

with a lower dose and adjust upward if necessary. These responses did not address the cost implications that concerned Radcliffe.

In his *qui tam* Complaint,[4] Radcliffe alleges that Purdue falsely and fraudulently, through its salesmen's oral misrepresentations and the information presented in the OxyContin package insert, asserted to physicians and other decision makers that there was a 2:1 equianalgesic ratio between OxyContin and MS Contin, and, thus, that OxyContin was cheaper per dose than MS Contin. He alleges that this was done to induce physicians to prescribe OxyContin and other decision-makers to purchase or authorize the purchase of OxyContin. He submits that each OxyContin prescription submitted to the government for reimbursement constitutes a false claim under the FCA and the analogous state statutes, because the product distributed had only half the potency that physicians and decision-makers had been led to believe it possessed. In his Complaint, Radcliffe cites the three publications shown to him by the physicians—the Clinical Practice Guideline, the USP, and the Textbook of Pain—to support the correctness of the 1:1 ratio. He also refers to, but does not cite, a single-

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[4] Radcliffe has amended his Complaint three times since it was originally filed, so that Purdue's Motion to Dismiss actually relates to the Third Amended Complaint filed June 5, 2007. For the purposes of addressing the public disclosure issue, the Complaint and the Third Amended Complaint contain the same claims and neither party has indicated that any relevant public disclosures were made between the date the Complaint was file and the date that the Third Amended Complaint was filed. For convenience, references herein to the "Complaint" shall include the most recent version.

dose study supporting the 2:1 ratio that he was told about by his supervisors at Purdue. It is unclear from the Complaint and subsequent filings whether Radcliffe ever read this study or merely heard about it from the supervisors and physicians.

The Fourth Circuit follows a three-step approach in determining whether the public disclosure bar applies. *Wilson*, 528 F.3d at 299. First, was there a public disclosure? If so, was the *qui tam* action based on the public disclosure? Finally, if the action was based on the public disclosure, was the relator an original source? *Id.* Under § 3730(e)(4), an action is properly dismissed for lack of subject matter jurisdiction only if there was a public disclosure on which the relator's allegations were based and that relator is not an original source. *Id.*

Section 3730(e)(4)(A) provides an exclusive list of sources that may give rise to a public disclosure that will strip a court of subject matter jurisdiction: "disclosures in (1) criminal, civil, or administrative hearings; (2) congressional, administrative, or Government [Accountability] Office reports, hearings, audits, or investigations; and (3) the news media." *Wilson*, 528 F.3d at 300-01 (alternations and internal quotations omitted); *see Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 870 (4th Cir. 1999). Disclosures made in other public forums do not implicate the public disclosure bar. *Id.*

In addition to this source requirement, the disclosure must have been of the "allegations or transactions" on which the *qui tam* action is based, not merely of information used by the *qui tam* relator. 31 U.S.C.A. § 3730(e)(4)(A); *see United States ex rel. Springfield Terminal Ry. Co. v. Quinn*,

14 F.3d 645, 654-55 (D.C. Cir. 1994); *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1512-14 (8th Cir. 1994). Generally, this does not require that the disclosure be of the specific allegations brought by the relator, but instead the disclosure must put the government on notice of the likelihood of fraudulent activity. *United States ex rel. Gilligan v. Medtronic, Inc.*, 403 F.3d 386, 389 (6th Cir. 2005); *see Springfield*, 14 F.3d at 655. To meet this requirement, it is sufficient that there have been either (1) disclosures of both a false state of facts and a true state of facts (not necessarily from the same source) so that fraud is implied; or (2) disclosure of an allegation of fraud, regardless of the specificity of the allegation. *Gilligan*, 403 F.3d at 389; *see also Springfield*, 14 F.3d at 655; *United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 385 (3d Cir. 1999); *Rabushka*, 40 F.3d at 1514.

Purdue argues that in the present case, the following constitute public disclosures: (1) published scientific articles and reference materials cited in the Complaint, which support an equianalgesic ratio of 1:1 between MS Contin and OxyContin for repeated dosing, but note the existence of single-dose studies that support a ratio of 2:1; (2) a single-dose study that supports an equianalgesic ratio of 2:1 and a published article and an abstract reporting the results of this study; (3) other materials published in scientific journals, which support the 2:1 equianalgesic ratio for longer-term use, that Purdue argues Radcliffe would have been familiar with in his employment; and (4) the OxyContin package insert, which was approved by the FDA and was, at one time, available on Purdue's web site.

The published scientific articles and reference materials cited by Radcliffe in his Complaint—the Clinical Practice Guideline, the USP, and the Textbook of Pain—fall within the "news media" category of § 3730(e)(4)(A) and constitute public disclosures. The term "news media" includes scholarly, scientific, and technical periodicals, including trade journals, because, like newspapers, these sources disseminate information to the public in a periodic manner. *United States ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d. 458 (S.D.N.Y.), *aff'd*, 53 F. App'x 153 (2d Cir. 2002); *see also Gold v. Morrison-Knudsen* Co., 68 F.3d 1475, 1476-77 (2d Cir. 1995); *State ex rel. Grayson v. Pac. Bell Tel. Co.*, 142 Cal. App. 4th 741, 754-55 (Cal. Ct. App. 2006). The three articles cited by Radcliffe were published in scientific and medical reference periodicals that distribute new or updated material on a periodic basis. Thus, I find that these constitute public disclosures in the news media.

In his Complaint, Radcliffe references, but does not cite, a single-dose potency study that his supervisors told him supported an equianalgesic ratio of 2:1. While the results of this study were not published until 1999, an abstract including the 2:1 equianalgesic ratio was published in 1996. *See* Robert F. Kaiko et al., *Analgesic Onset and Potency of Oral Controlled-Release (CR) Oxycodone and CR Morphine*, 59 (2) Clin. Pharmacol. & Therapeutics 130 [Abstract PI-4] (1996); G.B. Curtis et al., *Relative Potency of Controlled-Release Oxycodone and Controlled-Release Morphine in Postoperative Pain Model*, 55 Eur. J. Clin. Pharmacol. 425, 428 (1999). Both were published in scientific periodicals.

To the extent that Radcliffe based the allegations in his Complaint on either the published abstract or the published article, these constitute public disclosures in the news media.

Radcliffe argues that the published results of the single-dose study are not public disclosures under § 3730(e)(4)(A) because these were published in a foreign periodical. He relies on *United States ex rel. Yannacopolous v. General Dynamics*, 315 F. Supp. 2d 939, 949 (N.D. Ill. 2004), which held that newspaper articles published in Greek in the Greek press did not constitute disclosures to the American public. It reasoned that "[t]here is no public disclosure to the American public when information is divulged in a foreign publication, especially if published in a foreign language." *Id.* While the 1999 article was published in *European Journal of Clinical Pharmacology*, it was authored by scientists in the United States and written in the English language. Given the international nature of the scientific community, there is no indication that the publication of this article in a foreign scientific journal makes it any less accessible to the American public than if it were published in a scientific journal located in the United States. Regardless, the 1996 abstract was published in *Clinical Pharmacology & Therapeutics*, a scientific journal headquartered in Alexandria, Virginia. To the extent that Radcliffe derived the allegations in his Complaint from either of these sources, these will be considered public disclosures in the news media.

Purdue next argues that other scientific publications supporting an equianalgesic ratio of 2:1, not only for single or intermittent dosing but also for longer-term use, are public disclosures because "[a]s

a Purdue sales representative and supervisor, Radcliffe would have been trained on and intimately familiar with many Purdue articles endorsing a 2:1 equianalgesic potency ratio." (Defs.' Reply to Resp. to Mot. Dismiss 11.) Purdue does not claim definitively that Radcliffe actually knew of or relied on the particular scientific articles it cites. However, to the extent that Radcliffe actually did base his *qui tam* allegations on these articles, these will be considered public disclosures in the news media.

Finally, Purdue argues that the OxyContin package insert is a public disclosure, either in the news media or from an administrative investigation. The package insert recommends a starting conversion rate between OxyContin and MS Contin of 2:1, which can be reassessed based on a patient's reaction to the dosage. It further states that OxyContin is "indicated for the management of moderate to severe pain when a continuous, around-the-clock analgesic is needed for an extended period of time." (Mem. Supp. Defs.' Mot. Dismiss, Exs. C & D.) In addition to its inclusion in OxyContin packages, the package insert is available on Purdue's publicly assessable web site.

Purdue cites *United States ex rel. Doyle v. Diversified Collection Services, Inc.*, No. 2:04 CV 053, 2006 WL 3834407, at *3 (S.D. Ohio Dec. 29, 2006), for the proposition that publication on the Internet constitutes a public disclosure under § 3730(e)(4)(A). This case briefly mentions several sources— "two previously filed lawsuits against defendant, as well as an Internet web page and a Pittsburgh Post-Gazette article"—and summarily concludes that "these constitute public disclosures." *Id.* The opinion makes no mention of what type of

web page this is or whether it bears any resemblance to a traditional periodical. For instance, this web page could be affiliated with a news publication and, as such, would be updated regularly and would disseminate information to the public in a periodic manner. Its affiliation with a traditional news outlet or periodical or its identification as an online news outlet also identifies to the public that it is a place where news or periodical information on a particular topic can be found. Given the vast array and varying credibility of web pages on the Internet, I am not ready to conclude that anything posted online would automatically constitute a public disclosure within the meaning of § 3730(e)(4)(A).

Looking at the specific web page cited by Purdue, it appears that on July 18, 2001, the OxyContin package insert was posted to a section of Purdue's web page entitled "News & What's New." The package insert is currently posted to a section of Purdue's web page devoted to package inserts. Despite the labeling of the 2001 page, I find that this is not analogous to a traditional news outlet or periodical or even a trade journal because it involves information disseminated by one company about its own products, rather than a news organization or industry group disseminating information of general or specialized interest. Instead both the 2001 posting and the current posting of the OxyContin package insert seem more akin to a corporate report or a press release. While corporate reports have been held insufficient to implicate the jurisdictional bar of § 3730(e)(4)(A), *Rabushka*, 40 F.3d at 1514 n.2, press releases have been deemed public disclosures within the meaning of the statute, *United States ex rel. Kennedy v. Aventis Pharms., Inc.*, 512 F. Supp. 2d

1158, 1164-65 (N.D. Ill. 2007). Although the 2001 posting of the OxyContin package insert could be considered either a corporate report or a press release, because it was posted on a web page entitled "News & What's New" and because other items on the page resemble press releases, I will consider the OxyContin package insert a public disclosure in the news media. Accordingly, I do not address Purdue's second argument that the package insert is a public disclosure from an administrative investigation.

In summary, Purdue argues that the public disclosures in these scientific articles and in the OxyContin package insert amount to a disclosure of the fraudulent transactions alleged in Radcliffe's *qui tam* suit and put the government on notice of the potential fraud. Specifically, Purdue argues that the single-dose study, other scientific articles, and its OxyContin package insert, which recommend an equianalgesic ratio of 2:1 between OxyContin and MS Contin, represent the alleged "false" state of facts, while scientific sources cited by Radcliffe in the Complaint, which recommend a ratio of 1:1, represent the "true" state of facts. Together, Purdue argues, these create an implication of fraud sufficient to put the government on notice. While these public disclosures do demonstrate some disagreement or debate over the appropriate equianalgesic ratio, I am not convinced that they sufficiently raise the specter of fraud.

In *Rabushka*, a shareholder filed suit alleging that his conversations with company executives demonstrate that they fraudulently understated unfunded pension liability and spun off one of the company's components in order to shift responsibility for the pensions to another entity. 40

F.3d at 1510. Prior public disclosures revealed the spin off, the company's problems with the unfunded pension liability, and eventually, the company's bankruptcy. *Id.* at 1512. In holding that these disclosures did not raise the inference that company executives intentionally and fraudulently understated the pension problem or engineered the spin off in an attempt to avoid liability, the court noted that none of the disclosures imputed any bad faith or wrongdoing to the company and instead were "optimistic" about the company's future. *Id.* at 1512-13. Further, this shareholder-relator was the first to allege that company executives knew of the extent of the underfunding at the time of the spin off and that the liability was large enough to place the company in jeopardy of failing. *Id.* at 1513. While the prior public disclosures included information that was true, they did not reveal the "true" state of facts regarding the executives' knowledge or intentions. Because the information contained in the disclosures was insufficient to imply fraud, it did not trigger the jurisdictional bar. *Id.* at 1513-14.

Likewise, the prior public disclosures reveal that there was contradicting scientific evidence as to the relative potency of OxyContin to MS Contin, but they do not imply fraud. Some studies recommended an equianalgesic ratio of 1:1, particularly for chronic, around-the-clock dosing; they acknowledged studies that recommended a ratio of 2:1 for single or intermittent doses. While the OxyContin package insert recommends the 2:1 conversion ratio as a starting point for doctors switching patients from MS Contin to OxyContin, it also suggests the need to reevaluate based on each individual patient's response to the new medication. Finally, Purdue

submits that Radcliffe should have known of, and did not deny knowledge of, other studies supporting the 2:1 ratio for longer-term use.

Taken together, these disclosures reveal disagreement in the scientific community, but do not raise an inference of fraud. While these disclosures all reveal true information regarding the current state of the scientific debate, they do not reveal the "true" state of facts regarding the fraud alleged by the relator, that is, that Purdue used the 2:1 ratio despite knowing that it was inaccurate in order to mislead physicians and other decision-makers regarding the relative cost and potency of OxyContin. These disclosures suggest legitimate scientific debate and disagreement regarding the correct equianalgesic ratio, rather than any fraudulent intent on the part of Purdue. If anything on the record suggests fraud with respect to the relative cost and potency, it is the relator's statements regarding his experiences in being trained to market OxyContin and his questioning of his supervisors about the relative potency issue, as well as the internal training materials that explained how to address the relative cost issue with physicians.

Because I find that these scientific articles and the OxyContin package insert, taken together, do not disclose or imply fraud, and, thus, do not constitute a public disclosure of the allegations or transactions within the meaning of § 3730(e)(4)(A), I need not address the extent to which Radcliffe based his allegations on these materials, nor whether he was an original source.

I am troubled by the fact that Radcliffe's behavior, in waiting until the Department of Justice had already begun a criminal investigation into other allegations of marketing fraud committed by Purdue, before filing his *qui tam* action, suggests that he is an opportunistic relator. While allegations of fraud were known to the Department of Justice, they had not been publically disclosed within the meaning of § 3730(e)(4)(A). This subsection includes disclosures made in "criminal hearings," as well as those made in "administrative investigations," but I cannot see that, nor have the parties asserted that, either of these classifications applies to the current situation.

It has been held that disclosures made directly to relevant government officials, rather than to the public, can constitute public disclosures in administrative investigations when the disclosure is made "to a competent public official" "who has managerial responsibility for the very claims being made." *United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999). Had the substance of the relator's allegations been disclosed to an appropriate employee at the FDA with the authority to investigate these claims, that might have constituted a disclosure in an administrative investigation. However, that is not the situation before me.

For these reasons, I find that this court his subject matter jurisdiction over the Complaint.

III. THE RELEASE DEFENSE.

Purdue contends that Radcliffe released the claim made in his Complaint in the course of a settlement agreement with Purdue when he left its

employment. The facts surrounding this defense have been developed in the summary judgment record.

In his employment with Purdue between 1996 and 2005, Radcliffe was responsible for marketing OxyContin to individual physicians and became familiar with Purdue's marketing claims about OxyContin's relative cost and potency, including the claim that there is a 2:1 equianelgesic ratio between OxyContin and MS Contin.

As early as 1996, Radcliffe found that some of the physicians he spoke to were skeptical of this 2:1 ratio. When he raised the issue his supervisor assured him that the 2:1 ratio was correct. Apparently Radcliffe later experienced more doubts because in 2004 he sought legal advice and in January 2005 he anonymously contacted Randy Ramseyer, an Assistant United States Attorney for the Western District of Virginia, to gauge the government's interest in a claim against Purdue. It is undisputed that Radcliffe did not identify the nature of his allegations against Purdue in the course of these conversations with Ramseyer.

In January and February of 2005 Radcliffe sent emails to several officers and directors of Purdue, using the alias "John Femaledeer." In these somewhat rambling and incoherent emails, he warned Purdue that he was considering a *qui tam* suit, detailed his allegations, and offered to settle in exchange for an investment by Purdue in a project he was contemplating. He later retracted that offer after being informed by a lawyer that he could not settle a *qui tam* suit.

Several months later, Purdue restructured its sales force and Radcliffe was offered the option of transferring positions, which he declined, or termination with an extended severance package. On August 1, 2005, he signed a severance agreement, which included a general release of all claims against Purdue.[5]

Radcliffe then filed his *qui tam* Complaint on September 27, 2005. It is undisputed that Radcliffe did not disclose the nature of his *qui tam* allegations

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[5] The Agreement and General Release that Radcliffe signed contained the following language:

> Employee, of Employee's own free will, knowingly and voluntarily releases and forever discharges the Company, its affiliates, Associated Companies, subsidiaries, divisions, successors and assigns and the employees, officers, directors, owners, stockholders, trustees, predecessors, attorneys and agents thereof (collectively referred to as "The Purdue Associated Entities"), of and from any and all liability to Employee for actions or causes of action, suits, claims, charges, complaints, contracts (whether oral or written, express or implied from any source), and promises, whatsoever, in law or equity, which, Employee, Employee's heirs, executors, administrators, successors, and assigns (referred to collectively throughout this Agreement as "Employee") ever had, may now have or hereafter can, shall or may have, against The Purdue Associated Entities as of the date of the execution of this Agreement, including all unknown, undisclosed and unanticipated losses, wrongs, injuries, debts, claims, or damages to Employee, for, upon, or by reason of any matter, cause or thing whatsoever.

(Mem. Supp. Defs.' Mot. Dismiss, Ex. A-5, ¶ 4(a).)

to the government prior to the filing of his Complaint.[6]

During this period or time, the government was conducting its own comprehensive investigation into Purdue's manufacturing, marketing, and distribution of OxyContin. According to Assistant United States Attorney Rick A. Mountcastle, "one area of investigation concern[ed] whether Purdue falsely ma[illegible]ted OxyContin as being twice as potent as morph[illegible] and, accordingly, less expensive than MSContin." (Mountcastle Decl. ¶ (c).) He further stated that "the 2:1 comparison of OxyContin to MSContin [wa]s one of the areas under investigation." (*Id.* ¶ (f)(2).) Beginning in 2002 and continuing for the next several years, the government sought millions of documents from Purdue and conducted hundreds of interviews, some of which pertained to the relative potency and cost of OxyContin and MS Contin.

[Redacted].

On June 23, 2005, the government requested that Purdue identify the author and source of different versions of a document **[Redacted]** already in the government's possession, **[Redacted]**.

On June 24, 2005, a conversation took place between Department of Justice attorney Barbara Wells and attorney Michael Scheininger, who represented several Purdue employees, about topics

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[6] Ramseyer recalls receiving a telephone call from a West Virginia attorney regarding a possible qui tam suit against Purdue at some point prior to September 27, 2005. However, he states that no details of the alleged misconduct were given and the attorney did not identify the name of his client.

that would be discussed when those employees testified before the grand jury investigating Purdue. According to Scheininger, Wells mentioned several times that she wished to ask these witnesses about the dispute over the relative potency of OxyContin and MS Contin, among other topics, explaining that this related to the marketing and cost implications of the relative potencies. These employees were indeed asked questions pertaining to the relative potency issue during their grand jury appearances on July 20, 2005.

In mid-July 2005 the government reviewed and flagged numerous documents in the possession of four Purdue employees, **[Redacted]**. No list was kept of the documents reviewed or flagged, but according to the declaration of one of Purdue's outside counsel these included documents about the dispute over the relative potency of OxyContin and MS Contin. Counsel also stated that on July 28, 2005, she spoke to an attorney from the Department of Justice who expressed an interest in using electronic searches to identify documents **[Redacted]**.

Also on July 28, the government issued a subpoena for Michael Cullen, **[Redacted]**; he was later asked during his grand jury testimony about the relative potency issue. By this time, the government had also begun drafting Grand Jury Subpoena 513, which included requests for all documents discussing relative analgesic potency or safety of OxyContin and MS Contin.

Following Radcliffe's execution of the general release on August 1, 2005, the government's investigation continued. On August 2, 2005, a subpoena was issued commanding Radcliffe to

appear before the grand jury. In September, the Department of Justice contacted Purdue's outside counsel with electronic search terms designed to capture documents **[Redacted]**. These terms included those related to the issues of relative potency and cost, as well as those that seem more related to the potential for abuse or the effects of withdrawal. Modification of these search terms occurred in December, 2005.

On September 27, 2005, Radcliffe filed his *qui tam* Complaint. He attached to the complaint at least one document already in the government's possession: an "Answer Guide" used to train sales representatives, which urged them to emphasize OxyContin's higher potency and lower cost compared to MS Contin. Radcliffe was interviewed by law enforcement agents on October 28, 2005. Radcliffe was asked about the marketing of OxyContin as it related to the potential for addiction, but he was not asked about the relative cost and potency issue.

The government's investigation continued and on December 5, 2005, AUSA Mountcastle moved to stay Radcliffe's *qui tam* suit pending the government's ongoing investigation. Mountcastle argued that the suit could hinder the investigation because while Purdue was aware of the investigation "no mention ha[d] been made that the 2:1 comparison of OxyContin and MSContin [was] one of the areas under investigation." (Mountcastle Decl. ¶ (f)(2).) Further, Radcliffe was cooperating with the government and was scheduled to be a grand jury witness. Unsealing the Complaint or allowing the suit to proceed would make a portion of the grand jury's pending investigation public.

After the present *qui tam* suit was stayed, the government's investigation continued. Radcliffe was interviewed a second time in September 2006 and asked about the misleading promotion of OxyContin. He was not asked about the relative cost or potency of OxyContin and MS Contin, nor was he asked about the equianalgesic ratio of these two drugs.

The stay was lifted in late 2006, and the government chose not to intervene on May 8, 2007. On May 10, 2007, the government filed a criminal information against a related Purdue entity and several Purdue executives, along with executed plea agreements for all the criminal defendants. Although the criminal charges did relate to the misbranding of OxyContin, these charges focused on Purdue's marketing of OxyContin as "less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications." (Information ¶ 20, *United States v. Purdue Frederick Co.*, No. 1:07-CR-00029 (W.D. Va.)) None of the misbranding charges pertained to the relative cost and potency issue. The plea agreements included settlement of certain of the government's civil claims, but not of Radcliffe's *qui tam* suit.

Summary judgment is appropriate only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). All reasonable inferences are "viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (quotations and citations omitted). Once the moving party has met its burden, "the nonmoving party

must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)).

While the issue of whether a general release is enforceable to bar a subsequent *qui tam* action has not been addressed by the Fourth Circuit, the framework established by the Ninth Circuit in *United States ex rel Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995), and *United States ex rel Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997), has been applied by subsequent federal courts faced with the issue. *See United States ex rel. Gebert v. Transp. Admin. Servs.*, 260 F.3d 909, 916 (8th Cir. 2001); *United States ex rel. Bahrani v. Conagra, Inc.*, 183 F. Supp. 2d 1272, 1275-78 (D. Colo. 2002); *United States ex rel. DeCarlo v. Kiewit/AFC Enters., Inc.*, 937 F. Supp. 1039, 1043-47 (S.D.N.Y. 1996).[7]

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[7] Purdue urges the court to consider pre-*Green* cases *Virginia Impression Products Co. v. SCM Corp.*, 448 F.2d 262 (4th Cir. 1971), and *Coleson v. Inspector General of the Department of Defense*, 721 F. Supp. 763 (E.D. Va. 1989). However, neither case discusses the policy implications of enforcing a release in the context of the FCA. In *Virginia Impression Products*, which was decided before *Green* and also before *Rumery*, the Fourth Circuit chose to enforce a release to bar a subsequent antitrust claim. The court found no statutory or policy reasons to prevent enforcement of the release. Although antitrust cases are similar to qui tam suits in that the government relies on the enforcement efforts of private parties, the policy implications and economic incentives differ. *Coleson*, which was decided prior to *Green* but after *Rumery*, involved a claim brought under the anti-retaliation provisions of the FCA, rather than a qui tam claim brought on behalf of the government. While the court reasoned that the enforceability of the release should be governed by federal law because it arose under federal law, the court did not address

Green involved a general release between an employer and a terminated employee, who later filed a *qui tam* suit against that employer. *Green*, 59 F.3d at 956. After the action was filed, the United States investigated the *qui tam* relator's allegations, but ultimately chose not to intervene. *Id.* at 956-57. The district court granted summary judgment to the defendants who argued that, as part of the release, the relator had bargained away his right to bring the *qui tam* suit and as a result could not demonstrate any personal stake in the outcome sufficient to satisfy Article III standing. *Id.* The Ninth Circuit reversed, holding that a pre-filing release entered into without the government's knowledge or consent is not enforceable to bar a subsequent *qui tam* action because that would impair a substantial public policy.

In doing so, the court relied on the test set forth in *Town of Newton v. Rumery*, 480 U.S. 386 (1987),[8]

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any of the public policy concerns associated with qui tam suits or the FCA.

[8] To reach this decision, the Ninth Circuit first evaluated the statutory scheme of the FCA and determined that while Congress had addressed the ability of parties to settle postfiling, it left open the enforceability of pre-filing releases. *Green*, 59 F.3d at 959. As the release involved a statutorily-conferred federal right, the Ninth Circuit turned to federal common law to fill this "gap" in the statutory scheme. *Id.* at 960. Because of the potential in this area for state law to impair federal rights, the possibility of forum-shopping, and the unlikeness that uniform federal rule would disrupt commercial relationships predicated on state law, the Ninth Circuit chose to craft a uniform federal rule, rather than apply state law. *Id.* at 961 (applying the three-part test in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979)). Once it decided to fashion a uniform rule on the enforceability of pre-filing releases, the Ninth Circuit turned to *Rumery*, 480 U.S. at 392, to structure

that "'a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.'" *Green*, 59 F.3d at 962 (quoting *Rumery*, 480 U.S. at 392).[9] The Ninth Circuit determined that enforcement of the release would impair the public

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its discussion of competing policy concerns. *Green*, 59 F.3d at 962. This line of reasoning has been adopted by the Eighth Circuit, *Gebert* , 260 F.3d at 916, and the Southern District of New York, *DeCarlo*, 937 F. Supp. at 1043-46. It has been noted that "[c]ourts have applied *Rumery* to a broad spectrum of pre- and post-filing releases of *qui tam* claims entered into without the United States' knowledge or consent." *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 481 F. Supp. 2d 815, 818 (S.D. Tex. 2007).

[9] The Ninth Circuit also relied on *Davies v. Grossmont Union High School District*, 930 F.2d 1390 (9th Cir. 1991), which builds upon the *Rumery* test. *Davies* requires that a determination be made as to whether a substantial public interest would be impaired by enforcement of the agreement. If not, then the court balances "all the factors that bear on whether 'the public interest in enforcement of the agreement outweigh the policies furthered by non-enforcement.'" *Green*, 59 F.3d at 962 (quoting *Davies*, 930 F.2d at 1396). If a substantial public interest would be impaired, the court need not engage in the *Rumery* balancing test unless there is an articulated reason favoring enforcement aside from the "'interest in the settlement of litigation,'" as that "'cannot by itself outweigh a substantial public interest on the other side of the scales.'" *Id.* at 962-63 (quoting *Davies*, 930 F.2d at 1399).

The Fourth Circuit does not have any analogous case law interpreting *Rumery*. It has held that public policy is implicated only where "it is explicit, well defined and dominant, and ascertainable by reference to the laws and legal precedents and not from general considerations of supposed public interests." *L&E Corp. v. Days Inns of Am., Inc.*, 992 F.2d 55, 58 (4th Cir. 1993) (quotations and citations omitted). However, this applies to public policy concerns in the interpretation of a contract rather than in a determination of its validity. *Id.*

interest by diluting incentives to file *qui tam* suits, thus making the government less likely to learn of the alleged fraud, and by diluting the FCA's deterrent affect. The *qui tam* provisions are designed to supplement government enforcement of the FCA by using financial incentives to encourage insiders privy to fraud on the government to disclose this inside knowledge and potentially prosecute violations. *Id.* at 963. Relators, or private individuals who bring suits on behalf of the government, are entitled to a portion of the recovery from a *qui tam* suit, the amount of which depends on whether the government chooses to intervene after learning the allegations and prosecute the case itself and the overall importance of the relator's participation in the action. *Id.* at 963-64. Congress deemed this necessary because of reluctance on the part of insiders to come forward with relevant knowledge of fraud as well as federal enforcement agencies' relative lack of resources to investigate and prosecute allegations of fraud, leaving some potentially significant cases unaddressed. *Id.* at 963. Because a relator is only entitled to a portion of the proceeds from a successful *qui tam* suit, both the relator and the party accused of fraud could benefit financially by settling before the government learns of the allegations. The relator would likely be willing to accept a lower overall settlement amount from the other party, knowing that he would receive the entire amount, rather than only a portion of the settlement. *Id.* at 965-66. Thus, allowing enforcement of such a release to bar a subsequent *qui tam* suit undermines the financial incentives thought necessary by Congress to ensure that those with inside knowledge file *qui tam* suits alerting the

government of the alleged fraud and potentially assisting the government with its investigatory and prosecutory burden. *Id.* Further, because parties engaged in the fraud would be able to settle their claims with potential relators for significantly less than they would once the government became aware of the allegations, the FCA's deterrent effect is also lessened. *Id.*

The employer in *Green* argued that because the government had ultimately become aware of the allegations and conducted its own investigation, the release would not have detrimental effects. However, the Ninth Circuit noted that:

> the government only learned of the allegations of fraud and conducted its investigation *because of the filing of the qui tam complaint.* If the prevailing legal rule were that prefiling releases entered into without the government's consent or knowledge were enforceable, then it stands to reason that [the plaintiff-relator] never would have filed his *qui tam* complaint in the first place

and rejected this argument because of the *ex ante* effects of enforcing the agreement. *Id.* at 966.

Ultimately, the Ninth Circuit found that the significant public interests at issue when a potential relator and potential defendant execute a release, without the government's knowledge or consent, prior to the filing of a *qui tam* complaint outweighed the general interest in settling litigation and determined that, as a rule, such pre-filing releases were not enforceable to bar the subsequent *qui tam* actions. *Id.* at 969.

Later, in *Hall*, the Ninth Circuit carved out an exception to the general rule against enforcing pre-filing releases to bar subsequent *qui tam* suits: where the government has full knowledge of the allegations and an opportunity to investigate these prior to the release, the release will be enforceable and will bar a later *qui tam* suit. 104 F.3d at 231. *Hall* involved an employer who had been accused of fraud on the government by an employee. However, after the employee raised these concerns, the employer contacted the regulatory agency involved and apprised them of the allegations. *Id.* That agency investigated and concluded that it could not substantiate the allegations. *Id.* at 231-32. During the course of the agency's investigation, the employee was terminated and initiated a state court action, which did not include a *qui tam* claim. *Id.* at 232. The state court action resulted in a settlement and general release, which was executed more than a year after the agency had completed its investigation. *Id.* Months later, the former employee filed a *qui tam* complaint in federal court. *Id.*

As in *Green*, the Ninth Circuit in *Hall* relied on the *Rumery* test, but concluded that the concerns that weighed against enforcement in *Green* were not present. *Id.* at 233. Notwithstanding the government's lack of knowledge of or consent to the release, because the federal government was already aware of the allegations of fraud, the public interest in having information disclosed to the government was not implicated. *Id.* Likewise, the public interest in using *qui tam* suits to supplement federal enforcement of the FCA was not disturbed as the government had already investigated the allegations

prior to the release.[10] *Id.* Thus, the exception created by *Hall* provides that a release entered into after the government has full knowledge of the allegations and an opportunity to investigate will be enforced to bar a subsequent *qui tam* suit.

To determine whether the circumstances of a case fall within the general rule articulated in *Green* or the exception in *Hall*, the critical issue is the completeness of the government's knowledge or the fullness of its investigation. *United States ex rel. McLean v. County of Santa Clara*, No. C05-01962 HRL, 2006 WL 2067061 (July 25, 2006) at *7 ("[T]he key question is whether the government knew about [the relator's] allegations of fraud and had an opportunity to investigate them before the release was executed."); *Longhi*, 481 F. Supp. 2d at 820 ("If

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[10] It is not entirely obvious why the Ninth Circuit concluded that a full investigation negates the public interest in having a qui tam supplement federal enforcement, which includes not only disclosing information to the government, but also potentially investigating and prosecuting the case on behalf of the government. While this would seem to be the case in *Hall* since the federal government had not only completed its investigation, but concluded that the allegations could not be substantiated, this does not mean that there are not other cases that the government may have investigated fully but determined that it would not prosecute on its own for a variety of reasons, such as the low amount of money involved compared to the cost of prosecution, the low likelihood of success, or the lack of government resources to pursue it. It is important to note that the government's decision not to intervene "does not necessarily signal governmental disinterest in an action, as it is entitled to most of the proceeds even if it opts not to intervene." *DeCarlo*, 937 F. Supp. at 1047. In such cases, I can hardly think that the mere fact of a government investigation would negate the public interest in having a private citizen shoulder the burden of prosecution that would allow the government to recover monies lost through fraud

there is a dividing line to be found between *Hall* and *Green*, it is the fullness of the government's investigation, not the timing of the release."). Partial knowledge or investigation on the part of the government is insufficient to remove a case from the purview of *Green* into the exception created by *Hall*.[11] *Bahrani*, 183 F. Supp. 2d at 1272. Evidence presented in *Bahrani* demonstrated that, prior to executing a general release, the relator had two brief conversations with an FBI agent prior in which he made charges against his employer but offered no specifics regarding the alleged fraud. *Bahrani*, 183 F. Supp. 2d at 1277. More than a year later, after he had executed the release, the relator was contacted by USDA investigators and at this time he provided detailed information regarding his allegations. *Id.* at

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[11] Purdue contends that, under *Hall*, enforcement of a release to bar a subsequent qui tam action is appropriate even if the government has not completed its investigation. The citations it relies on to support this argument are inapposite or misleading. Purdue cites *Gebert*, 260 F.3d 909, in which the government did not investigate until after the filing of the qui tam complaint and the court ultimately chose to enforce the release. However, the decision to enforce the release turned on the fact that the release occurred "in the context of a bankruptcy proceeding, not through a general, independent release of a claim for money." *Id.* at 916. The court did not inquire into the fullness of the government's investigation. Purdue also argues that in *Hall* itself the government had not completed its investigation prior to the execution of the release. In *Hall*, the Nuclear Regulatory Commission ("NRC") completed and closed an investigation after the defendant made it aware of the relator's allegations, before the filing of the qui tam complaint. After the qui tam suit was initiated, the NRC revisited its prior investigation and reached the same conclusions. This is factually distinct from the situation in which the government is in the midst of an ongoing investigation.

1277-78. In finding the release unenforceable, the court reasoned that the limited knowledge of the allegations held by the government did not negate the public interest in providing incentives for the relator to fully disclose inside information concerning the allegations to the government. *Id.* at 1278. It further reasoned that "[t]he public's interest in [the relator] maintaining the ability to bring a *qui tam* action to supplement federal enforcement of the FCA also remained as there was no guarantee when [the relator] executed the Release that the federal government was ever going to investigate, let alone prosecute," the alleged fraud. *Id. Longhi* involved a release executed eleven days after the relator filed a *qui tam* complaint. 481 F. Supp. at 817. The government began a lengthy investigation after the execution of the release and ultimately chose to intervene. *Id.* The court held the release unenforceable both because it was executed within the statutory sixty-day investigatory period and interfered with the government's ability to evaluate whether to intervene in the suit and because it was contrary to public policy under the *Green/Hall* framework. *Id.* at 818. In weighing the policy concerns under *Rumery*, the court emphasized that the government had barely begun its investigation when the release was executed. *Id.* at 820. The government stated that without the relator's assistance following the release date it could not have issued a warrant to obtain documents or made sense of those documents when received and that given that these documents were not received until several weeks after the release date, the government had not had the opportunity to fully investigate prior to the execution of the release. *Id.* at 821.

Based on the evidence in the present case, it is clear that the government was aware of the substance of Radcliffe's allegations[12] and had begun, but not completed, its investigation of these allegations as of the date of the release. Radcliffe's allegations pertain to the issue of the relative cost and potency of OxyContin and MS Contin. Specifically, he alleged that Purdue fraudulently marketed OxyContin using the 2:1 equianalgesic ratio, thus claiming that its relative cost was less than that of MS Contin. Document production requests made by the government and conversations between lawyers representing the government and Purdue or its employees in June and July of 2005 suggest that the government was trying to learn more about the relative cost and potency issue. Michael Scheininger, counsel to several Purdue employees, stated that Department of Justice lawyer Barbara Wells informed him on June 24, 2005, of her

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[12] The parties argue over whether *Hall* requires that the government know of the substance of the allegations (that is, the alleged wrongdoing itself) or whether the government must know of the actual allegations made by the relator (that is, the fact that the relator has alleged such wrongdoing). It is unclear from *Hall* whether the NRC was made aware of the identity of the specific person making the allegations when it first investigated the matter. The court stated that the defendant "informed the [NRC] of Hall's concerns," but it does not necessarily follow that in doing so Hall was identified to the NRC. *Hall*, 104 F.3d at 231. Subsequent cases have not addressed this type of argument. I think it is sufficient under *Hall* that the government know of the substance of the allegations. This furthers the public interests in encouraging a potential relator to disclose his allegations to the government as quickly as possible, before the government has an opportunity to discover the alleged wrongdoing through other means

intent to ask several of his clients about the dispute over the relative potency of OxyContin and MS Contin, explaining that it related to the marketing and cost implications. By the end of July, the government had also begun drafting Grand Jury Subpoena 513 which included requests for all documents discussing the relative analgesic potency or safety of OxyContin and MS Contin. However, it is also clear from the evidence that the government continued to seek such information after the release had been executed on August 1, 2005. In September and December of 2005, the Department of Justice contacted Purdue with electronic search terms, some of which pertained to the relative cost and potency issue. On December 5, 2005, AUSA Mountcastle described the government's investigation as including "whether Purdue falsely marketed OxyContin as being twice as potent . . . and, accordingly, less expensive than MSContin" and the accuracy of "the 2:1 comparison of OxyContin to MSContin." (Mountcastle Decl. ¶¶ (c) and (f)(2)). This implies that the government was by that point aware of the substance of allegations, but more importantly that those facets of their investigations were still ongoing, beyond the date of the release.

Purdue argues that, under *Rumery*, the circumstances present here do not implicate the public interests articulated in *Green*, do not outweigh the general interest in settling litigation, and, thus, support enforcement of the release to bar this *qui tam* suit. Specifically, they argue that, as here, where the government learned of the allegations independently and had already begun its investigation into the substance of the allegations prior to the date of the release, where the relator

delayed in filing the *qui tam* complaint and attempted to settle with the defendants prior to doing so, and where the government ultimately chose not to intervene, enforcement of the release is appropriate. However, I believe that enforcing the release under these circumstances would substantially impact important public interests associated with the FCA.

Enforcement of a release to bar a subsequent *qui tam* suit implicates several articulated public interests. These include the public interest in having relators disclose inside information of alleged fraud to the government, in having relators supplement federal enforcement of the FCA by assisting the government in its investigation and prosecution or prosecuting the claim itself, and in deterring future fraud against the government. *See Green*, 59 F.3d at 965-68; *Bahrani*, 183 F. Supp. 2d at 1278.

Here, it appears that the government did learn of the substance of Radcliffe's allegations independently and was interested enough in them to request documents pertaining to and question various Purdue employees about the relative cost and potency issue. However, the government ultimately took its investigation in a different direction, focusing on the misbranding of OxyContin as "less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications." (Information ¶ 20, United States v. Purdue Frederick Co., *supra*.) The final settlement in the criminal case did not contain any reference to the relative cost and potency issue and did not purport to settle Radcliffe's suit. As in *Bahrani*, when the release was executed there was no guarantee that

the government would end up prosecuting based on the relator's allegations. The public interest in Radcliffe maintaining the ability to supplement federal enforcement of the FCA by prosecuting these allegations on behalf of the government remains.

Purdue argues that Radcliffe was a bad actor who waited to file his *qui tam* complaint and, prior to doing so, attempted to settle with Purdue in exchange for an investment in a company he was starting. The "John Femaledeer" emails indicate that Radcliffe did try to settle his claims with Purdue, but later retracted this offer after being told by an attorney that *qui tam* claims could not be settled without the government's consent. Purdue's response was ambiguous, first stating that Radcliffe did not have legitimate claim, but if he thought he did he should make it, then expressing an interest in investing in Radcliffe's company.

With respect to Radcliffe's delay in filing his *qui tam* suit, I agree that this does weigh in favor of enforcement as a means to encourage relators to file quickly and disclose their allegations to the government as soon as possible. However, Radcliffe did file while the government was still investigating and when he could potentially still have been of use to the government. With respect to the settlement attempts, it would seem counterintuitive to enforce a release to bar a subsequent *qui tam* suit, thus foreclosing the relator's ability to prosecute on behalf of the government, to punish that relator for trying to settle instead of filing suit in the first place. Were this the rule, a relator who initially tried to settle would have no incentive to disclose the allegations to the government in lieu of settlement. As a

result, such a rule would reward potential defendants who encourage settlement and would impair the public interest in having relators disclose information to the government.

Finally, the government's decision not to intervene in this suit, announced on May 8, 2007, should not be a basis for enforcement of the release. *See DeCarlo*, 937 F. Supp. at 1047.[13] The government's decision not to intervene "does not necessarily signal governmental disinterest in an action, as it is entitled to most of the proceeds even if it opts not to intervene." *Id.* Enforcing a release in this situation would deprive the public of a potential relator to enforce the FCA and recover monies for the government treasury. This rule would also make the enforcability of such a release dependant on the government's intervention decision and may discourage some potential relators from initiating *qui tam* suits in the first place, leaving some allegations undisclosed. *See id.* Further, such a rule would mean that the enforceability of the release would be uncertain until such time as the government chose whether to intervene, which would undermine the countervailing interest in settlement of litigation.

Accordingly, I find that under these circumstances, enforcement of the release would undermine important public interests associated with the FCA, as well as the countervailing interest in settling litigation. The generalized interest in settling litigation is outweighed in the present

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[13] *But see United States ex rel. Whitten v. Triad Hosps., Inc.*, No. CIV.A. CV202-189, 2005 WL 3741538, at *5 (S.D. Ga. Oct. 27, 2005) (citing *DeCarlo* for the opposite conclusion).

circumstances by public interests that would be impaired by enforcement of this release, and so analysis under the *Rumery* test does not favor enforcing Radcliffe's release.

The circumstances here fall within the general rule articulated in *Green* that pre-filing releases are unenforceable to bar subsequent *qui tam* actions, rather than the *Hall* exception, because the government had not fully investigated the substance of Radcliffe's allegations. Further, the public policy concerns raised by Purdue do not alter the relative balance of public interests under the *Rumery* test. The general release executed by Radcliffe does not bar this action.

IV. RULE 9(B) REQUIREMENT.

Purdue argues that Radcliffe has failed to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b).

Lack of compliance with the pleading requirements of Rule 9(b) is treated as a failure to state a claim under Rule 12(b)(6). *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 n.5 (4th Cir. 1999). With respect to allegations of fraud, "the 'circumstances' required to be pled with particularity under Rule 9(b) are 'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.'" *Id.* (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1297, at 590 (2d ed. 1990)).

After carefully considering the arguments of the parties, I hold that the Complaint does not adequately state a claim for fraud under Rule 9(b).

In his Complaint, Radcliffe alleges that Purdue "encouraged physicians to write prescriptions that were paid by Medicaid and other government programs for OxyContin that was materially less potent . . . and as a result, generally more expensive than the OxyContin that was described in [Purdue's] marketing pitch to the same physicians." (Third Am. Compl. ¶ 30.) Radcliffe also avers that

> Relator cannot identify at this time all of the false claims which were caused by Purdue's conduct. The false claims were submitted primarily by pharmacists as a result of the fraudulently induced prescriptions (who apparently did not know they were false) with whom the Relator had no dealings and the records of the false claims are not within the Relator's control. Indeed, specification of the vast amounts of false claims would be burdensome to the Court and the parties. Given the vast number of false claims, their scope and complexity, Relator is excused from the requirement of specifying each false claim. Such claims were made across the entire United States.

(*Id.* at 36.)

While Purdue concedes that a defendant may be liable for inducing a third party to submit a false claim to the government, it argues that Radcliffe's allegations do not meet the Rule 9(b) pleading requirements because he does not describe even a single instance in which a physician was influenced

to prescribe OxyContin based on Purdue's misrepresentations, and where a claim for payment was made by the pharmacist to the government. I agree.

Of course, it is plausible that a physician would be so induced by false representations concerning OxyContin's relative potency to write a prescription, ultimately paid for by the government. But that is not sufficient to meet the rigorous standard of Rule 9(b). *See United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 733 (1st Cir. 2007).

Radcliffe requests that if the Complaint is found insufficient on this ground, that he be granted leave to file an amended complaint. Purdue objects, but I find no cognizable basis for denying Radcliffe's request. *See id.* at 733-34 (remanding to allow leave to amend).

V. CONCLUSION.

For the reasons stated, the Motion to Dismiss will be denied in part and granted in part, with leave to amend.

A separate order will be entered herewith.

DATED: October 14, 2008

/s/ James P. Jones
Chief United States District Judge

Entered: May 21, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1202(L)
(1:05-cv-00089-jpj-pms)

UNITED STATES OF AMERICA, STATE OF DELAWARE, COMMONWEALTH OF VIRGINIA, STATE OF CALIFORNIA, STATE OF HAWAII, STATE OF NEVADA, STATE OF TENNESSEE, STATE OF ILLINOIS, STATE OF NEW HAMPSHIRE, DISTRICT OF COLUMBIA, STATE OF FLORIDA, STATE OF MASSACHUSETTS, STATE OF TEXAS, STATE OF LOUISIANA EX REL. MARK RADCLIFFE,

Plaintiffs – Appellants,

v.

PURDUE PHARMA L.P.; PURDUE PHARMA, INCORPORATED,

Defendants – Appellees

UNITED STATES OF AMERICA,

Amicus Curiae

No. 09-1244
(1:05-cv-00089-jpj-pms)

UNITED STATES OF AMERICA, STATE OF DELAWARE, COMMONWEALTH OF VIRGINIA, STATE OF CALIFORNIA, STATE OF HAWAII, STATE OF NEVADA, STATE OF TENNESSEE, STATE OF ILLINOIS, STATE OF NEW HAMPSHIRE, DISTRICT OF COLUMBIA, STATE OF FLORIDA, STATE OF MASSACHUSETTS, STATE OF TEXAS, STATE OF LOUISIANA EX REL. MARK RADCLIFFE,

Plaintiffs – Appellants,

v.

PURDUE PHARMA L.P.; PURDUE PHARMA, INCORPORATED,

Defendants – Appellees

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge Agree, and District Judge Blake.

For the Court

/s/ Patricia S. Connor, Clerk

31 U.S.C. § 3729 (2000) (FALSE CLAIMS ACT)

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS. Any person who-

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt

without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge

of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) KNOWING AND KNOWINGLY DEFINED. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) CLAIM DEFINED. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) EXEMPTION FROM DISCLOSURE. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) EXCLUSION. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and

proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO *QUI TAM* ACTIONS.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such

person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv)otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery

in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO *QUI TAM* PLAINTIFF.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by

the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was

brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.
(2)(A) No court shall have jurisdiction over an

action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A)No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying

the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, anyone defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3733. Civil investigative demands

(A) IN GENERAL.

(1) ISSUANCE AND SERVICE. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony. The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any

manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) CONTENTS AND DEADLINES.

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall--

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii)identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall--

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii)identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall--

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii)specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv)notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v)describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) PROTECTED MATERIAL OR INFORMATION.

(1) IN GENERAL. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under--

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of

the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any 31 U.S.C. § 3733 (2000) (FALSE CLAIMS ACT) person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.

(1) By WHOM SERVED. Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES. Any such demand or any petition filed under subsection G) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in

such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.

(1) LEGAL ENTITIES. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection G) may be made upon a partnership, corporation, association, or other legal entity by--

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return

receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS. Service of any such demand or petition may be made upon any natural person by--

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE. A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection G) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand..

(f) DOCUMENTARY MATERIAL.

(1) SWORN CERTIFICATES. The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by--

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of

the facts and circumstances relating to such production and authorized to act on behalf of such person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS. Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection G)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES. Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by--

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory. If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.

(1) PROCEDURES. The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall

not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT. The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN. The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY. When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the

officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS. Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) CONDUCT OF ORAL TESTIMONY.

(A) Any person compelled to appear for oral testimony under a civil investigative demand

issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral. examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) WITNESS FEES AND ALLOWANCES. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.

(1) DESIGNATION. The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or

employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and

conditions as the Attorney General shall prescribe--

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS. Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL. If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and--

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B» which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS. In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the

official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly--

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated. Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.

(1) PETITION FOR ENFORCEMENT. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph *(A)*, and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may

stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking

relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION. Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under

this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE. The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) DEFINITIONS. For purposes of this section--

(1) the term "false claims law" means--

(A) this section and sections 3729 through 3732; And

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false

claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(l); and

(7) the term "product of discovery" includes--

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A)

Entered: April 7, 2010

RECORD NOS. 09-1202(L), 09-1244 XAP

In The
United States Court Of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA, STATE OF DELAWARE, COMMONWEALTH OF VIRGINIA, STATE OF CALIFORNIA, STATE OF HAWAII, STATE OF NEVADA, STATE OF TENNESSEE, STATE OF ILLINOIS, STATE OF NEW HAMPSHIRE, DISTRICT OF COLUMBIA, STATE OF FLORIDA, STATE OF MASSACHUSETTS, STATE OF TEXAS, STATE OF LOUISIANA EX REL. MARK RADCLIFFE,
Plaintiff – Appellant/ Cross-Appellee,

v.

PURDUE PHARMA L.P.; PURDUE PHARMA, INCORPORATED,
Defendants – Appellees/Cross-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ABINGDON

PETITION FOR PANEL REHEARING AND
REHEARING EN BANC

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159 West Main Street
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Counsel for
Appellant/Cross-Appellee

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Counsel for
Appellant/Cross-Appellee

Statement Of Purpose And Rule 35(b) Statement

1. **The panel decision conflicts with the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.**

The United States agrees with whisteblower Radcliffe that, under the "partial assignment" standing doctrine set forth in *Stevens*, a private citizen who brings False Claims Act (FCA) *qui tam* action has no cognizable interest in the Government's fraud claim against the contractor that is the basis of the *qui tam* action until the citizen files the lawsuit. The panel decision is completely at odds with *Stevens* on this point: "once the government suffered an injury (and Radcliffe became aware of the fraud causing the injury),

Radcliffe had a statutory claim" at that time even before he filed a *qui tam* action. (Op. 18)

The panel decision on this point was determinative for the appeal because it enforced a contract purporting to release all of Radcliffe's claims as of the date that the contract was executed, which date was prior to when he filed his *qui tam* action.

2. **This proceeding involves a question of exceptional importance: whether a government contractor can prohibit its employees, by contract, from enforcing the FCA to recover to the United States Treasury monies that the contractor cheated the Government out of.**

The panel's decision will have the likely effect of costing the U.S. Treasury billions of dollars in unrecovered fraud monies by reducing the number of *qui tam* FCA actions and thereby undermining the effectiveness of the FCA, our nation's most important weapon against Government contractor fraud.

Argument

1. **The Panel Decision Conflicts With the *Stevens* Decision On A Determinative Issue.**

The panel decision acknowledged that the decision of the United States Supreme Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), set forth the rationale as to why a private citizen has standing to bring a *qui tam* FCA action to recover monies fraudulently obtained from the United States Government: "[t]he FCA can reasonably be regarded as effecting a partial assignment of the

Government's damages claim." *Id.* at 773, *quoted in* Op. at 17. Thus, "the [FCA] statute gives the relator himself an interest in the [FCA *qui tam*] lawsuit." *Id.* at 772, *quoted in* Op. at 18.

Nonetheless, the panel then concluded that "once the government suffered an injury (and Radcliffe became aware of the fraud causing the injury), Radcliffe had a statutory claim . . . as partial assignee before he filed a *qui tam* suit. (Op. at 18). **The panel's conclusion is completely at odd with *Stevens***, which made it clear that, prior to the filing of *qui tam* suit, the potential relator does not have "any right, claim or demand." *Stevens*, 529 U.S. at 773 n. 3. Quoting Blackstone with approval, the *Stevens* court noted that "'no particular person, A or B, has any right, claim or demand, in or upon [the bounty], till after [the] action [was] brought.'" *Id.*

The United States, in an amicus brief it filed in a prior court of appeals case, agrees that this lack of any cognizable claim accruing to the relator prior to his filing of the *qui tam* action is compelled by *Stevens*:

> [U]ntil the relators actually filed a *qui tam* action, the FCA claims could have been asserted, under appropriate circumstances, by any other individual with knowledge of the alleged fraud. Thus, . . . **the "assignment" of the government's claim of injury could not have occurred until the relators actually filed their FCA action.**

(Brief For The United States As Amicus Curiae filed in *United States ex rel. Gebert v. Transport Admin. Servs.*, 260 F.3d 909 (8th Cir. 2001)(emphasis added)(citing *Stevens*))(Doc. 64-5, at sec. III, ¶ 2).

Indeed, as the Ninth Circuit has explained, under the "assignment" theory of standing, the potential relator accepts the FCA's offer of an assignment and thereby receives the interest only by the act of filing the *qui tam* complaint:

> [T]he FCA effectively assigns the government's claims to *qui tam* plaintiffs such as Kelly, who then may sue based upon an injury to the federal treasury. Under this theory of standing, **the FCA's *qui tam* provisions operate as an enforceable unilateral contract. The terms and conditions of the contract are accepted by the relator upon filing suit.**

Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993)(adopting assignment theory of standing prior to *Stevens*)(emphasis added).

This Court has observed that a relator's recovery in a *qui tam* action "is analogous to a lawyer's contingen[cy] fee." *United States ex rel. Wilson v. Graham Cty. S&W Conserv. Dist.*, 528 F.3d 292, 299 (4th Cir. 2008). There is no question that a lawyer does not have any cognizable claim or interest in a debt owed to, or a cause of action owned by, a potential client until the lawyer accepts the client's offer that the lawyer attempt to collect the debt or prosecute the cause of action in exchange for a contingency fee. With respect to the FCA, the relator accepts the FCA's offer of the contingency fee by filing the FCA action.[1]

---

[1] What makes this point particularly subject to confusion is that filing a lawsuit usually merely enforces, perfects or "vindicates" an already existing inchoate claim or cause of

The panel's attempt to square its conclusion with *Stevens* — "[i]n short, he had 'an interest in the lawsuit' regardless of when he opted to vindicate it," (Op. 19.) — lays bare the internal inconsistency of the panel's conclusion. One "vindicates" a *claim* by filing a lawsuit; one does not vindicate "an interest in the lawsuit" by filing the lawsuit. A *qui tam* lawsuit does not exist until the private citizen files it. And there is no "relator" until the suit is filed. By filing the *qui tam* lawsuit, a relator vindicates the *Government's* fraud claim, and thereby accepts the FCA's offer of a partial assignment of the Government's interest in that lawsuit.

Accordingly, the panel's holding on this issue is inconsistent with the *Stevens* decision on this point, as correctly construed by the United States. As discussed below, this holding has tremendous practical implications that are injurious to the national interest. By characterizing a potential whistleblower's power under the FCA to recover for the U.S. Treasury monies fraudulently taken from the United States as an existing claim personal to the whistleblower, the panel decision put that power within the scope of boilerplate release provisions of tens of thousands of run-of-the-mill severance agreements and releases. As discussed below, the enforcement of those releases, in conjunction with the panel's holding noted above, gives a green light to employers to financially bludgeon employee-

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action and does not create a new interest. Here, the filing of the lawsuit by the relator *does* create a new claim *for the relator* since it constitutes an acceptance of the FCA's unilateral assignment contract, thereby executing it and effecting the partial assignment of the Government's claim to the relator.

whistleblowers into abandoning efforts to employ the FCA to recover monies for the U.S. Treasury.

2. **This Proceeding Raises The Issue Of Whether Contractors Who Defraud The Government Can Prohibit Their Employees From Enforcing The FCA To Restore The Fraud Proceeds To The Federal Treasury By Making The Prohibition A Condition Of Employment Or Severance Pay.**

Under the panel's holding, an employer who has defrauded the Government can thwart the recovery by whistleblower-employees enforcing the FCA of those ill gotten funds to the Treasury by requiring that the employees agree not to take those FCA enforcement actions — so long as the Government has some knowledge of the allegations of fraud. This panel holding allows the enforcement of such agreements even where the Government neither consented, nor was even aware of the agreement. As the Ninth Circuit has held, "[p]ermitting a prefiling release when the government has neither been informed of, nor consented to, the release would . . . frustrate one of the central objectives of the Act." *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 965 (9th Cir. 1995). It will severely undermine the enforcement of the FCA just at the time government expenditures are ballooning and the fight against the fraud and abuse of taxpayer monies is becoming ever more important to our nation's financial health.

The FCA gives special powers and incentives to citizen whistleblowers to enforce the FCA alone in cases where the Government is aware of the allegations of fraud, but chooses or is unable for various reasons to pursue them. *See, e.g.*, 31 U.S.C.

§ 3730(d)(relator's minimum award increases from 15% to 25% when Gov't chooses not to intervene in *qui tam* action). Congress empowered citizens to enforce the FCA even without the assistance of United States Government because, as Congress concluded, the Government does not have the resources to investigate adequately even all of those allegations that could lead to significant cases, much less to prosecute them:

> Taking into consideration the vast amounts of Federal dollars devoted to various complex and highly regulated assistance and procurement programs, Federal auditors, investigators, and attorneys are forced to make "screening" decisions based on resource factors. **Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient.**

False Claims Amendment Act of 1986, S. Rep. No. 99-345, at 23 (1986),(emphasis added).

Congress made clear that its "overall intent in amending the *qui tam* section of the FCA [in 1986 was] to encourage more private enforcement suits." Id. at 34. The panel decision frustrates this main purpose of Congress in amending the FCA – encouraging supplemental enforcement of the FCA by *qui tam* relators, but justifies it by concluding that that express Congressional purpose was outweighed by the interest in providing a special incentive to contractors to voluntarily disclose alleged fraud and the interest in encouraging settlements. (Op. at 24-25). However, the role

of courts is to determine the intent of Congress in enacting statutes, like the FCA, "not to make a freewheeling policy choice," like the one this panel made. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993).

The panel decision gives the green light to companies that cheat the Government to "forc[e] [their employees who are] potential relators to sign general agreements invoking release and indemnification from future suit," *United States ex rel. Longhi v. Lithium Power Tech. Inc.*, 575 F.3d 458, 474 (5th Cir. 2009), either when they learn that a Government investigation is already underway, or to silence potential relator-employees and then "disclose" the allegations to the Government in a self-serving light, with the hope that the Government would decline further investigation at some stage.

Any employer who wishes to minimize its exposure to FCA liability would be foolhardy not to require that every employee waive his right to file a *qui tam* action as a condition of employment and any severance pay. While the panel limits the enforcement of such agreements to situations where the Government already knows the substance of the relator's allegations prior to the filing of the *qui tam* suit, the possibility that, after the whistleblower has taken the courageous step of filing his *qui tam* action, it will be revealed that the Government had already learned of the substance of the allegations in course of a secret investigation creates a huge uncertainty for the wavering potential whistleblower, on top of the other uncertainties, such as whether he will be the first-filed relator. This new additional uncertainty created by the panel decision

as to whether the contemplated *qui tam* lawsuit will be dismissed on a technicality unrelated to the merits will certainly discourage many whistleblowers from filing suit even where the prohibition agreement would have been subsequently adjudicated as unenforceable.

The biggest loser from the panel decision is the American taxpayer. At least seventy percent of the proceeds from FCA *qui tam* actions accrue to the federal Treasury. The taxpayer will likely lose billions of dollars as Government contractors who cheat rush to implement their potent new weapon — enforceable contracts prohibiting citizen FCA enforcement — o stop FCA enforcement efforts by their whistleblower employees to restore the misgotten funds to the federal Treasury, and to intimidate employees from attempting to do so in the first place.[2]

Conclusion

Based on the foregoing, Appellant Radcliffe respectfully requests that the panel rehear the appeal, or in the alternative, that this Court rehear the appeal *en banc*.

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[2] In this case alone, Purdue defrauded Medicaid of tens of millions of dollars as a result of a marketing program that was not only fraudulent but which Purdue affiliates admitted was criminal and for which they pled guilty to criminal charges and agreed to pay over $600 million in criminal fines. (Appellant's Resp. Br. 2) The enforcement of the release to prohibit Radcliffe from restoring those tens of millions of dollars to the federal Treasury essentially results in a permanent loss of that money by the Treasury, and the American taxpayer.

Respectfully submitted, this 7th day of April 2010.

/s/ Mark T. Hurt
ATTORNEY AT LAW
159 West Main Street
Abingdon, VA 24210
(276) 623-0808

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CERTIFICATE OF COMPLIANCE
WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   this brief contains 2,202 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   this brief has been prepared in a proportionally-spaced typeface using Word Perfect in 14 point Times New Roman.

/s/ Mark T. Hurt
Counsel for Appellant/
Cross Appellee
Dated: April 7, 2010

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 7, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Jennifer O'Connor
Howard M. Shapiro
WILMERHALE
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
Counsel for
Appellees/Cross-Appellants

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Laura C. Bunton
Laura C. Bunton
GIBSON MOORE APPELLATE SERVICES, LLC
421 East Franklin Street, Suite 230
Richmond, VA 23219

February 12, 2008

By fax: 202-663-6363
Jennifer M. O'Connor, Esquire
Wilmer Cutler Pickering Hale & Dorr, LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006

Re: Subpoena directed to Randy Ramseyer, Esq.
Subpoena directed to Barbara T. Wells, Esq.
United States ex rel. Radcliffe v. *Purdue Pharma L.P. et al,*

Dear Jennifer:

Thank you for our conversations this past Friday afternoon and your conversation earlier today with Rick Mountcastle.

As a result of these conversations, we understand that the above-referenced subpoenas for testimony from the government to be submitted to the Court pursuant to its January 4, 2004 Order will be handled in the following manner:

(1) You will provide our office with written questions as a proposed alternative to the depositions of Barbara Wells and Randy Ramseyer. You indicated that you expect to provide the questions to this office by Friday, February 15, 2008.

(2) The government will prepare a declaration that answers the questions, and will submit that declaration to the Court *ex parte* and *in camera* for its determination regarding (l) whether all or part of the declaration is relevant to the issues the Court is considering; (2) whether a protective order is

required due to the nature of the information in the declaration prior to the parties receiving the declaration; or (3) whether any answers must be withheld from the parties entirely pursuant to rules or regulations or privileges that are not satisfied or overcome by the need for the information in this litigation. The government will seek to complete this process by Friday, February 22, 2008. In the event that it becomes apparent that the February 22 date cannot be met, we will notify you.

(3) The deposition subpoenas will be suspended during the time that the questions are provided to and considered by the government and any answers submitted to the Court.

(4) Should the government, upon review of the submitted questions, object to responding to any of them, we will contact and confer with you to determine whether a resolution of the objection(s) is possible. If no resolution is possible, we will answer the questions and the Court will determine upon receipt of the declaration whether the government's answer should be shared with the parties. In that event, each party reserves the right to make such legal arguments as it deems appropriate regarding whether the government should be compelled to respond to such questiol1(s).

(5) If the procedure outlined above should fail or otherwise be discontinued, you reserve the right to re-institute and 'seek enforcement of the subpoenas and the government reserves the right to make any and all objections to the subpoenas. If this is not your understanding, please advise immediately either by phone at 540-857-2254, or by email at sara.winn@usdoj.gov.

Very truly yours,

JOHN L. BROWNLEE
United States Attorney

/s/
Sara Bugbee Winn
Assistant United States Attorney

Cc: The Honorable James P. Jones,
Chief United States District Court Judge
Mark Hurt, Esq.
Randy Ramseyer. Esq.
Rick Mountcastle, Esq.
Barbara T. Wells, Esq.
Terry Henry. Esq.
Carol Wallack, Esq.
Ken Jost, Esq.
Brian McCabe, Esq.

Entered November 30, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

Case No. 1:05CV00089

UNITED STATES OF AMERICA,
ex rel. MARK RADCLIFFE
Plaintiff,

v.

PURDUE PHARMA L.P. & PURDUE PHARMA, INC.,
Defendants

THE UNITED STATES' UNOPPOSED APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE ITS STATEMENT OF INTEREST AND *AMICUS CURIAE* BRIEF REGARDING DEFENDANTS' MOTION TO DISMISS

COMES NOW, the United States, as the real party in interest, and pursuant to FRCP 6(b), respectfully requests that the Court enter an Order granting the United States an additional seven (7) days, to and including December 10, 2007, to file its Statement of Interest Under 28 U.S.C. § 517 and *amicus curiae* brief regarding certain issues raised in Defendants' Motion to Dismiss. In support thereof, the United States, through the undersigned, states as follows:

1. Mark Radcliffe, ("Relator") filed his Complaint on September 27, 2005 pursuant to the *qui tam* provisions of the False Claims Act (hereinafter "FCA"), 31 U.S.C. § 3729, *et seq.* Relator alleges that Defendants, who manufacture OxyContin, knowingly made, used or caused to be made or used, false statements about the drug's efficacy to get false or fraudulent claims paid or approved by the United States Government in violation of 31 U.S.C. § 3729.

2. While the United States has declined to intervene, it remains a real party in interest. The United States has a significant interest in False Claims Act case law, even when generated in a declined *qui tam*, and is entitled to attend to its interests pursuant to 28 U.S.C. § 517.

3. On October 2, 2007, Defendant filed a Motion to Dismiss with the Court. In this Motion, Defendant raises several legal issues involving pleading requirements under the FCA, the applicable statute of limitations under the FCA and relator's knowing and voluntary waiver of the claims made in his Complaint. Pursuant to Court Order, relator's Opposition is due on December 3, 2007.

4. While the United States takes no position on the merits of relator's allegations, it does believe that these arguments are legally baseless and would, if accepted, have a wide-ranging and devastating effect on the Government's ongoing efforts to protect the public against fraud.

5. The United States therefore is preparing a detailed pleading setting out the United States' position on these issues. As preparing this pleading requires the involvement and approval of several trial and supervisory attorneys at the Department of

Justice, the process of preparing this pleading is quite time consuming. In addition, the United States plans to speak with counsel for Defendants on these issues in an effort to narrow the focus of Defendants' Motion to Dismiss if possible. Therefore, the United States wishes to have an additional seven (7) days to file its Statement of Interest so that this pleading can be as efficient and helpful to this Court as possible.

6. Counsel for the United States contacted counsel for both Relators and Defendants. Both counsel consented to the United States' application for additional time.

WHEREFORE, the United States requests that the Court enter an Order granting the United States a seven day enlargement of time, to and including December 10, 2007, to file its Statement of Interest.

Respectfully submitted,

JEFFERY S. BUCHOLTZ
Acting Assistant Attorney General

JOHN L. BROWNLEE
United States Attorney for
the Western District of Virginia

BY */s/*
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DATED: November 30, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 30, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of filing to counsel as follows:

Mark T. Hurt, Esquire
159 West Main Street
Abingdon, Virginia 24210
Counsel for Relator

Howard M. Shapiro, Esquire
Stuart F. Delery, Esquire
Kimberly A. Parker, Esquire
Jennifer M. O'Connor, Esquire
Ashley Baynham, Esquire
Robert A. Mays, Esquire
Wilmer Cutler Pickering Hale and Dorr, LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Counsel for Defendants

/s/
SARA BUGBEE WINN

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

Civil Action No. 1:05CV00089

UNITED STATES OF AMERICA *ex rel.*
MARK RADCLIFFE,
Plaintiff,

v.

PURDUE PHARMA, INC., *et al.*
Defendants.

ORDER

Upon Consideration of the United States' Unopposed Application for Extension of Time in Which to File Its Statement of Interest and Amicus Curiae Brief Regarding Defendants' Motion to Dismiss, and good cause having been established, it is hereby

ORDERED

that the United States shall have an additional seven (7) days, up to and including December 10, 2007, in which to file its Statement of Interest and Amicus Curiae Brief Regarding Defendants' Motion to Dismiss.

ENTERED this _____ day of December, 2007.

_____
JAMES P. JONES
Chief United States District Judge

PURDUE

One Stamford Forum
Stamford, CT 06901-3431
www.purduepharma.com

August 4, 2005

Mr. Mark T. Radcliffe
213 Pinewood Drive
Shady Spring, WV 25918
Dear Mark:

Enclosed please find your copy of the fully executed Agreement and General Release. If you have any questions, please call me at (203) 588-7035.

We extend our best wishes to you for the future.

Very truly yours,
Danielle Nelson
Vice President, Human Resources
Administration
& EEO Compliance

EXHIBIT

A-5

PURDUE

One Stamford Forum
Stamford, CT 06901-3431
www.purduepharma.com

June 23, 2005

Mr. Mark T. Radcliffe
213 Pinewood Drive
Shady Spring, WV 25918

Dear Mark:

You have informed us that you have declined our offer to transfer. This letter will serve to document the terms of your separation from Purdue Pharma L.P. ("the Company") effective August 25, 2005. You are required to report to work through July 7, 2005. If you are working in a state that requires the Company to distribute a notice of unemployment, such notice will be mailed to your home following your termination of employment.

As a result of your termination, you are eligible for separation pay under Separation Pay Plan 515. Under the Separation Pay Plan, you will continue to receive your pay and benefits in accordance with the section of Exhibit A entitled Notice Period, Pay and Benefits through August 25, 2005. Thereafter, even if you resign prior to your termination date, you will be provided Notice Pay (which is provided pursuant to the confidentiality and inventions agreement attached as Exhibit B to the Agreement and General Release) in the form of salary continuation. You will be paid for accrued but untaken 2005 vacation ill a

lump sum as soon as practicable following your termination from employment.

In exchange for execution of the enclosed Agreement and General Release, the Company is offering you a benefits package pursuant to Separation Pay Plan 515 which exceeds any benefits to which you would otherwise be entitled under any other agreement, plan or policy of the Company. Under this package, you will be eligible for Severance Pay as outlined in the section of Exhibit A entitled Severance Package. Additional terms of your package, including details regarding benefits eligibility and continuation, also are contained in Exhibit A. If you do not accept this Agreement and General Release, your hospital, medical, dental and life insurance benefits will terminate at the end of the month that Notice Pay ceases.

Any payments due to you will be based on your current base salary of $115,000.00 on the Company's regularly scheduled pay periods. Severance payments will be paid during the severance period on the Company's regularly schedule[] pay periods after the later of receipt of Notice Pay or the Effective Date of the Agreement and General Release, provided that you have executed (and not revoked) the Agreement and General Release.

We urge you to review these documents with an attorney of your choice. You have until August 11, 2005 (more than forty-five (45) days) to consider the Agreement and General Release and the disclosure statement attached as Exhibit C. You may revoke the Agreement and General Release within seven days after your execution of it by following the procedures set forth in the Agreement and General

Release. If acceptable to you, please execute two copies before a Notary Public on or after your last day of work and return them to me for countersignature. I will then send a fully executed copy to you.

You have until no later than July 8, 2005 to arrange for the purchase of your company-leased vehicle. A vehicle quote and information packet detailing how to purchase your car is included in your separation folder. If you choose not to purchase your company-leased vehicle, it must be returned at the time of your check out which we expect will be no later than July 8, 2005.

You will be contacted by a Manager to set up a time for return of any Company property in your possession, including but not limited to, any identification card, card key, computer, telephone, handheld device, documents, disks, data (in any form), books, promotional materials, samples and credit, expense or telephone cards. For your convenience, enclosed is a return addressed, postage paid envelope for your use in returning your Company credit, gas, expense or telephone cards.

You will continue to have access to the Gelco ExpenseLink system through IPASS in order to process any outstanding expenses. These expenses must be processed prior to your checkout. Instructions for completing an expense report are enclosed in the separation folder.

If you have questions, please contact me at (203) 588-7035.

Very truly yours,

Danielle Nelson
Vice President, Human Resources Administration
& EEO Compliance

AGREEMENT AND GENERAL RELEASE

Agreement and General Release ("Agreement") effective as of the date set forth herein between, Purdue Pharma L.P., One Stamford Forum, Stamford, CT 06901, (referred to throughout this Agreement as "the Company"), and Mark T. Radcliffe, 213 Pinewood Drive, Shady Spring, WV 25918 (referred to throughout this Agreement as "Employee").

1. Employee's employment with the Company will be terminated effective August 25, 2005 unless Employee resigns prior to that date or the Company, in its sole discretion, upon sixty (60) days notice, determines that Employee's services are no longer required.

2 In consideration for the execution by Employee of this Agreement, and compliance with the promises made herein, the Company agrees to pay and/or provide Employee with Severance Package benefits as set forth in Exhibit "A" attached hereto.

3. Employee understands and agrees that the Severance Package benefits as set forth in Exhibit "A" are provided pursuant to Separation Pay Plan 515 and exceed any payment or benefit to which Employee otherwise would be entitled under any policy, plan or procedure of 111c Purdue Associated Entities (as defined below) or any agreement with The Purdue Associated Entities.

4 . (a) Employee, of Employee's own free will, knowingly and voluntarily releases and forever discharges the Company, its affiliates, Associated Companies, subsidiaries, divisions, successors and

assigns and the employees, officers, directors, owners, stockholders, trustees, predecessors, attorneys and agents thereof (collectively referred to as "The Purdue Associated Entities"), of and from any and all liability to Employee for actions or causes of action, suits, claims, charges, complaints, contracts (whether oral or written, express or implied from any source), and promises, whatsoever, in law or equity, which, Employee, Employee's heirs, executors, administrators, Mark T. Radcliffe successors, and assigns (referred to collectively throughout this Agreement as "Employee") ever had, may now have or hereafter can, shall or may have, against The Purdue Associated Entities as of the date of the execution of this Agreement, including all unknown, undisclosed and unanticipated losses, wrongs, injuries, debts, claims, or damages to Employee, for, upon, or by reason of any matter, cause or thing whatsoever Without limiting the generality of the foregoing release, this Agreement is intended to and shall release The Purdue Associated Entities from any and all matters arising out of Employee's employment by the Company and the cessation of said employment, and any emotional distress or other personal injury sustained by Employee whether or not as a result of any conduct by The Purdue Associated Entities, including, but not limited to, any alleged violation of (i) Title VII of the Civil Rights Act of 1964, as amended; (ii) Sections 1981 through 1988 of Title 42 of tile United States Code; (iii) the Age Discrimination in Employment Act of 1967; (iv) the Employee Retirement Income Security Act of 1974, as amended (excluding claims for accrued, vested benefits under any employee benefit plan of the Company); (v) the

Americans with Disabilities Act of 1990; (vi) the Fair Labor Standards Act; (vii) the Occupational Safety and Health Act; (viii) the National Labor Relations Act; (ix) any other federal, state or local civil or human rights laws; (x) any other alleged violation or any federal, state or local law, regulation or ordinance, and/or public policy, contract or tort or common-law having any bearing whatsoever on the terms and conditions and/or cessation of Employee's employment with the Company; and (xi) any claim for costs, fees, or other expenses, including attorneys' fees, incurred in these matters. Nothing in this Agreement shall prevent Employee from filing a claim for unemployment compensation.

(b) "Associated Companies" shall mean with respect to the Company, any person, firm, trust, corporation or other entity or combination thereof which directly or indirectly (a) controls said party, (b) is controlled by said party, or (c) is under common control with said party; the terms "control" and "controlled" meaning ownership of fifty percent (50%) or more, including ownership by trusts with substantially the same beneficial interests, of the voting and equity rights of such person, firm, trust, corporation or other entity or combination thereof or the power to direct the management of such person, firm, trust, corporation or other entity or combination thereof.

5. To the maximum extent permitted by law, Employee agrees that Employee will not seek and waives any right to accept any relief or award from any charge or action against The Purdue Associated Entities before any federal, state, or local administrative agency or federal, state or local court whether filed by Employee or on Employee's behalf

with respect to any claim or right covered by paragraph 4. Employee confirms that as of the execution of this Agreement, no charge, complaint, claim or action exists in any forum or form. In the event that a charge, claim or action is filed by Employee or on Employee's behalf, the Company is entitled to any restitution, recoupment or setoff as provided by the courts and may recover costs and attorneys' fees in defending such action to the fullest extent permitted by law.

6. Employee represents and acknowledges that the obligations undertaken by Employee in the confidentiality and inventions agreement, a copy of which is attached as Exhibit "B," shall, notwithstanding paragraph IS, continue and survive the termination of Employee's employment and this Agreement.

7. (a)Employee represents that Employee has not disclosed, and agrees not to disclose, either directly or indirectly, any information whatsoever regarding the existence or substance of this Agreement except (i) as required by a court or governmental authority pursuant to a valid Subpoena about which the Company has been notified and been provided the opportunity to respond; or (ii) to Employee's immediate family, at1omey(s), accountant(s) or other financial advisor(s) or career and psychological counselors provided that Employee obtains agreement from such persons to be bound by the confidentiality and non-disclosure provisions of this paragraph.

(b) Employee shall not make any adverse or derogatory statement about The Purdue Associated Entities to third parties, including comments or

statements that would adversely affect The Purdue Associated Entities, The Purdue Associated Entities' employees, or individuals or entities with whom The Purdue Associated Entities has a business relationship.

(c) Employee shall direct any request for references to Danielle Nelson, Vice President, Human Resources Administration & EEO Compliance. in response to such requests, Ms. Nelson only shall provide job title(s) and dates of employment A letter of reference is included in the separation folder.

(d) Employee acknowledges that, as of the execution of this Agreement; Employee has returned any Company property in Employee's possession, including but not limited to any identification card, card key, computer, handheld device, documents, disks, data whether in hardcopy or electronic form, books, all credit, expense or telephone cards. Employee acknowledges that Company may withhold severance payments until all Company property is returned.

(e) Employee agrees to fully cooperate with, and assist, The Purdue Associated Entities and/or their counsel in connection with topics relating to any matter ill which Employee was involved or of which Employee has knowledge or information, including but not limited to, current assignments and projects, research projects, products or pipeline, publications, patent prosecution, defense or enforcement, employment related issues, litigation of any type, including but not limited to, product liability litigation and defense, defense of federal or slate investigations or prosecutions of any type

(including administrative, legislative and executive), and antitrust defense. Such cooperation shall include, but not be limited to, Employee making themselves available at reasonable times, and for reasonable periods of time, for consultation with The Purdue Associated Entities, their management and/or their counsel, assistance with document production, document review, document execution, deposition preparation, deposition testimony, witness interviews, preparation and witness testimony, transfer or transition of projects, publications, and in the preparation, review, execution, and prosecution of any patent applications. During the separation period, Employee shall receive no additional compensation for time that Employee may provide to The Purdue Associated Entities and their counsel in connection with this sub-paragraph. Following the separation period, Employee will receive a reasonable hourly rate, to be mutually agreed upon by the parties, for time that Employee may provide to The Purdue Associated Entities and their counsel in connection with this subparagraph.

8. Employee agrees that if Employee is rehired or employed or retained by TI1C Purdue Associated Entities in any capacity (excluding a predetell1lined stay- period or services provided pursuant to sub-paragraph 7(e)) while in the Notice Period, receiving Notice Pay or Severance Package benefits, the payment or provision of such benefits immediately shall cease and no additional benefits shall be provided.

9. This Agreement is made in the State of Connecticut and shall be interpreted under the laws of said State. Its language shall be construed as a

whole, according to its fair meaning, and not strictly for or against either party. Should any provision of this Agreement, including the general release language, be declared illegal or Unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, such provision shall inunediately become null and void, leaving the remainder of this Agreement in full force and effect.

10. Employee agrees that neither this Agreement nor the furnishing of the consideration for this Agreement shall be deemed or construed at any time for any purpose as an admission by The Purdue Associated Entities of any wrongdoing, liability or unlawful conduct of any kind.

11. This Agreement may not be modified, altered or changed except upon express written consent of both parties wherein specific reference is made to this Agreement.

12. Employee has been advised that Employee has until August 11, 2005 (more than forty-five (45) days from receipt of the Agreement and the disclosure statement attached as Exhibit "C") to consider the meaning and effect of this Agreement. Employee has been advised to consult with an attorney prior to execution of this Agreement. Employee may accept its terms by signing it on or after Employee's last day of work and returning it to Danielle Nelson, Vice President, Human Resources Administration & EEO Compliance, c/o One Stamford Forum, Stamford, CT 06901 by no later than the end of business on August 11,2005.

13. Employee understands that Employee may revoke this Agreement for a period of seven (7) days following the day Employee executes this Agreement

("Revocation Period"). Any revocation within this period must be submitted, in writing, to Howard Udell, and state, "I hereby revoke my acceptance of our Agreement and General Release." Said revocation must be delivered personally to Mr. Udell, or mailed to Mr. Udell via certified mail, return receipt requested, at One Stamford Forum, Stamford, Connecticut 06901 and postmarked within seven (7) days of Employee's execution of this Agreement. This Agreement shall become effective and enforceable on the eighth day following Employee's execution of this Agreement provided that Employee has not revoked this Agreement during the Revocation Period ("Effective Date"). In the event Employee does not accept this Agreement as set forth above, this Agreement, including any obligation of the Company to provide the Severance Package benefits set forth in Exhibit A, automatically shall be deemed null and void.

14. Employee's acceptance of the Severance Package benefits described in Exhibit "A," from the Company at any time after the Revocation Period shall constitute an admission by Employee that Employee did not revoke this Agreement during the Revocation Period, and shall constitute an admission by Employee that this Agreement has become effective and enforceable.

15. This Agreement and any exhibits thereto, set forth the entire agreement between the parties hereto, and fully supersede any prior agreements or understandings between the parties. Employee further attests that no other promises or inducements have been offered for this Agreement, other than those set forth above, and that Employee

is legally competent to execute this Agreement and accept full responsibility for it

16. THE PARTIES HAVE READ AND FULLY CONSIDERED THE AGREEMENT AND ARE MUTUALLY DESIROUS OF ENTERING INTO SUCH AGREEMENT. THE TERMS OF THIS AGREEMENT ARE THE PRODUCT OF MUTUAL NEGOTIATION AND COMPROMISE BETWEEN EMPLOYEE AND THE COMPANY. EMPLOYEE ACKNOWLEDGES THAT EMPLOYEE (i) HAS HAD AT LEAST FORTY-FIVE (45) DAYS TO CONSIDER THIS AGREEMENT AND THE DISCLOSURE STATEMENT ATTACHED AS EXHIBIT "C"; (ii) HAS CAREFULLY READ THE AGREEMENT AND THE DISCLOSURE STATEMENT IN THEIR ENTIRETY; (iii) HAS BEEN ADVISED IN WRITING TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTION OF THIS AGREEMENT; (iv) FULLY UNDERSTANDS THE SIGNIFICANCE OF ALL OF THE TERMS AND CONDITIONS Of THIS AGREEMENT; (v) HAS DISCUSSED IT WITH INDEPENDENT LEGAL COUNSEL, OR HAS HAD A REASONABLE OPPORTUNITY TO DO SO; AND (vi) HAS HAD ANSWERED TO EMPLOYEE'S SATISFACTION ANY QUESTIONS EMPLOYEE HAS ASKED WITH REGARD TO THE MEANING AND SIGNIFICANCE OF ANY PROVISIONS OF THIS AGREEMENT. HAVING ELECTED TO EXECUTE THIS AGREEMENT, TO FULFILL THE PROMISES SET FORTH HEREIN, EMPLOYEE FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION, ENTERS INTO THIS AGREEMENT INTENDING TO WANE, SETTLE AND RELEASE ALL LIABILITY FOR AND

RECOVERY FROM CLAIMS EMPLOYEE EVER HAD, NOW HAS OR MIGHT HAVE AGAINST THE COMPANY AS OF THE DATE OF THE EXECUTION OF THIS AGREEMENT.

THEREFORE the parties hereto now voluntarily and knowingly execute this Agreement and General Release.

Mark T. Radcliffe

EXHIBIT A
SUMMARY OF BENEFITS[1]
PURSUANT TO PURDUE SEPARATION PAY PLAN 515

Mark T Radcliffe

NOTICE PERIOD, PAY AND BENEFITS (provided whether or not you execute the Agreement and General Release)

1. Notice Period: 6/24/2005 - 8/25/2005

   You will receive pay through August 25, 2005 in the form of salary continuation at your annual base salary of $115,000.00, less applicable withholding deductions, unless you resign prior to that date.

2. **2nd Quarter 2005 Bonus Payment**: If you are bonus eligible, you will be paid your 2nd quarter 2005 bonus, less applicable withholding deductions, after the time that sales data for such time period is received and bonus payments are calculated.

3. **Notice Pay**: Following the conclusion of the Notice Period, you will receive 2 weeks of pay in the form of salary continuation which is provided pursuant to Exhibit 13, your confidentiality and inventions agreement..

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[1] Purdue reserves the right to modify or change any of the benefit plans referred to within this Summary of Benefits, provided that no such modification shall reduce the amount of separation pay you are being provided. ID the event of a conflict of this Summary of Benefits and the terms of a benefit or insurance plan, the terms of the plan or the plan document govern.

4. **Vacation Entitlement**: You will be paid in a lump sum, less applicable withholding deductions, for accrued but untaken 2005 vacation through your termination date, at the conclusion of your Notice Pay.

5. **Hospital, Medical and Dental Benefits**: Will remain in effect until the earlier of September 30, 2005 or the end of the month in which your Notice Pay ceases unless you execute the Agreement and General Release. Your health insurance cost share, currently $90.00 per month, will continue during the period your benefits remain in effect. When and if prior to such date you become eligible for and elect health benefits under a health plan of a new employer, your health benefits as provided by the Company will cease. You agree to notify the Company immediately of such event. In the event that you fail to notify the Company, you agree to reimburse the Company for any expenses it has incurred in connection with claims made by you after the date on which you are no longer entitled to such benefits. Your new employment will not affect your severance pay.

   When hospital, medical and dental benefits are no longer provided through the Company, you may obtain continuing coverage under the Consolidated Omnibus Budget Reconciliation Act ("COBRA") as amended by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") on a month-to-month basis for a maximum period of eighteen months by paying the group rate then in effect directly to the carrier. Information will be mailed to you at the appropriate time prior to the end of your

severance period from our COBRA administrator, Benefit Concepts Systems, Inc.

6. **Pension Plan:** (f as of your termination date, you are considered a Participant as defined in the Pension Plan, you will continue to accrue pension credit for service and benefit accrual through the conclusion of the Notice Period and Notice Pay.

Your status:

a. You are fully vested in the Pension Plan:

Yes_X_ No____

In accordance with Internal Revenue Regulations. all affected Participants have attained full vesting.

b. Eligible for reduced Early Retirement benefit after age 55 with 10 years of service:

Yes____ No_X_

c. Eligible for pension benefit at age 65.

Yes_X_ No____

If the present value of any vested accrued benefit is less than $1,000, in accordance with the Pension Plan, if such benefit is not otherwise distributed it automatically will be distributed to you in a lump sum by the Company when administratively practicable. Information regarding distribution will be sent under separate cover.

7. **Retirement Savings Plan - 401 (k):** Participation:
Yes____ No_X_

No further contributions or company match will be made to your 401(k) account after the conclusion of the Notice Period and Notice Pay.

If your balance is less than $1,000, including rollover monies, if such balance is not otherwise distributed it automatically will be distributed to you by the Company when administratively practicable. Please notify Human Resources regarding your requested form of payment. (f your balance is greater than $1,000, the following rules apply:

a. You may receive distribution of your plan benefits during any month after proper notification has been given to the Company; or

b. You will receive distribution of your plan benefits no later than the attainment of age 70 ½.

You may request a direct roll-over to an individual IRA with Fidelity, or to all IRA of your choosing, to protect your distribution from 10% penalty (if prior to age 59 ½) and 20% tax withholding.

8. **Group Life Insurance**: Life insurance in the amount of $345,000 will remain in effect until the earlier of September 30, 2005 or the end of the month in which your Notice Period ceases unless you execute the Agreement and General Release When group life insurance is no longer effective, you may be eligible to convert all or a portion of your present entitlement. Please contact Human Resources for further details.

9. **Personal Accident Insurance**: will remain in effect until your termination date.

10. **Travel Accident Insurance**: will remain in effect until your termination date.

11. **Reimbursement Spending Accounts**: If you are participating ill the Health Care or Dependent Care Reimbursement Spending Account, deductions will continue through the end of the Notice Period. You may submit requests for reimbursement of eligible expenses incurred through the end of the Notice Period up to your annual election in the Health Care Spending Account and/or up to the account balance in your Dependent Care Account.

12. **Tuition Reimbursement**: No requests for tuition reimbursement will be approved prospectively for coursework commencing after June 23, 2005 unless already approved and the coursework is in progress.

13. **No other benefits, including sho/1 or long-term disability are provided beyond your last day of work.**

SEVERANCE PACKAGE (The following pay and benefits are provided only in exchange for execution of the Agreement and General Release and if you remain in employ in good standing through the last day that the Company, in its sole discretion, determines that your services arc no longer required)

The following benefits were calculated assuming a termination date of August 25, 2005. If you are required to work during the Notice Period or any subsequent period and your termination date changes because the Company, in its sole discretion,

upon sixty (60) days notice, determines that your services are no longer required, these benefits will be adjusted accordingly

1. **Severance Period:** 9/912005 – 1/20/206 9:36:00 AM

   Salary Continuation 19 weeks and I day at annual base salary of $115,000.00 $42,461.76, less applicable withholding deductions.

The first payment (and any retroactive payments due) to be made on the later of the first pay period immediately following the receipt of Notice Pay or the Effective Date of the Agreement, provided that you have executed (and not revoked) the Agreement and General Release.

2. **Hospital, Medical and Dental Benefits:** Will remain in effect, as outlined above, until the last day of the month in which your severance benefits cease. Your health insurance cost share will continue during the severance period.

3. **Group Life Insurance:** Life insurance in the amount indicated above will remain in effect through the last day of the month during which you are receiving severance payments, provided that such coverage will cease no later than 12 months from the end of the month in which your employment termination is effective.

   When group Life insurance is no longer effective, you may be eligible to convert all or a portion of your present entitlement. Please contact Human Resources for further details.

4. **Pension Plan:** If as of your termination date, you are considered a Participant as defined in the Pension Plan, you will continue to accrue pension credit for service and benefit accrual through the conclusion of the severance period.

Purdue Pharma L.P.
100 Connecticut Avenue
Norwalk, Connecticut 06850-3590
(203) 853-0123
(203) 853-1576 - Fax

Mark T. Radcliff
713 Pinewood Drive
P .0. Box 657.
Shady Spring, WV 25918

In consideration of your present and future employment by the Company and the payment to you of the salary or benefits from time to time agreed upon, you agree as follows:

1. You do hereby assign and agree to assign to the undersigned Company, its successors and assigns, all of your rights to ideas, inventions and discoveries which you make or conceive during the period of your employment by the Company, provided such ideas, inventions and discoveries relate either (i) to drugs, chemicals, food supplements and food substitutes and devices and packaging and the methods of making or using any of the same, or (ii) to any field in which the Company is or shall be actively engaged during the time of your employment.

2. You do hereby agree that such ideas, inventions and discoveries shall be and become the property of the Company upon your making or conception of them, and that you will promptly disclose them to : n officer of the Company in writing.

3. It is further agreed that without charge to the Company, but at its expense, you will execute,

acknowledge and deliver all such further papers, including applications for patents and specific assignments of inventions, and perform such other acts as you lawfully may, as may be necessary in the opinion of the Company to obtain or maintain protection by way of patents or otherwise for such ideas, inventions and discoveries in any and all countries, and to vest title thereto in the Company, its successors and assigns.

4. In order that there shall be no misunderstanding, should you have conceived or made any ideas, inventions or discoveries prior to the date of this letter which are not the property of the Company and which have not prior to the date of this letter been incorporated in any patent applications, it is required that you set them forth on the reverse side of this letter. You and the undersigned will then initial such disclosures and it will be agreed that such ideas, inventions and discoveries shall not be assigned to the Company pursuant to this agreement. Such ideas, inventions or discoveries that you do not list on the reverse side of this letter which come within the area defined in paragraph 1 above are to be conclusively presumed to be made during the course of your employment by the Company.

5. In view of the fact that during your employment there will be entrusted to you much nonpublic information, all of which you acknowledge is confidential, you agree that during your employment and after you leave the employ of the Company, you will maintain such information in confidence and will neither use it yourself nor disclose it to any third persons without our express permission in writing.

6. During the course of your employment there will be entrusted to you a great deal of written, graphic and computer-generated material, all of which you acknowledge is or shall be the property of the Company and shall be returned to it, including all copies of such material, .not later than the termination of your employment.

7. You agree that upon termination of your employment for any. reason, you will promptly return all of the written, graphic or computer-generated material which you have originated or received in the course of your employment, including all copies of such material.

8. For purposes of this agreement, the term "Company" shall be deemed to include the undersigned Company as well as any of its affiliated or associated entities.

9. Nothing in this agreement shall change the general employment understanding between us pursuant to which you and the Company have agreed that you are engaged on an indefinite basis and that either you or the Company may terminate your employment for any reason as of the end of two weeks' notice.

10. You will devote your full time and attention to the affairs of the Company and will not engage in any other work, employment or business activity of any kind without our express written consent.

11. No change, modification, termination, discharge or waiver of any or all of the provisions of this agreement shall be valid unless the same shall be in writing and signed by you and an officer of the Company on behalf of the Company.

12. Your obligations under this agreement shall survive the termination of your employment with the Company.

13. This agreement shall be governed by the laws of the State of Connecticut.

Your signature at the space provided below will constitute a binding agreement between us.

Very truly yours,
Purdue Pharma L.P.
By: /s/ Patricia L. Leigh
Patricia L. Leigh
Authorized Agent

ACCEPTED AND AGREED TO:
By: /s/ Mark T. Radcliff
Employee Signature

Date: 1/22/1996

EXHIBIT C

DISCLOSURE INFORMATION PROVIDED PURSUANT TO THE OLDER WORKERS' BENEFIT PROTECTION ACT

Due to the loss of the OxyContin® patent appeal, Purdue Pharma L.P. and its associated U.S. companies[1] are restructuring and reducing staffing levels in various field based positions in the Sales Department. As a result, the employment of certain employees in those positions will be terminated.

All field-based employees in the Sales Department are eligible and were considered.

Employees, who are notified between June 9, 2005 and June 24, 2005 that their employment will be terminating due to a company restructure, are selected and are being offered a severance package in exchange for their execution of(and subject to) the attached Agreement and General Release ("Agreement").

Selected employees have more than forty-five (45) days from the receipt of this disclosure information and the Agreement to sign the Agreement and return it to Danielle Nelson, Vice President, Human Resources Administration, One Stamford Forum, Stamford, CT 06901. If a selected employee signs the Agreement, the Employee has seven (7) days after signing it to revoke the acceptance of its terms. The Agreement will become effective on the eighth (8th) day after the employee signs it, provided that the

[1] For purposes of this disclosure, Purdue Pharma L.P.'s associated companies include Purdue Pharma of Puerto Rico.

employee does not revoke the Agreement during the revocation period.

In accordance with federal law, a listing of the job titles and dates of birth of employees who were selected and not selected for notification between June 9, 2005 and June 24, 2005 is attached.

PURDUE

One Stamford Forum
Stamford, CT 06901-3431
www.purduepharma.com

June 2005

To Whom It May Concern:

Mr. Mark T Radcliffe was employed by Purdue Pharma L.P. on January 22, 1996. Mr. Radcliffe was separated due to a company restructure. Mr. Radcliffe's expected termination date is August 25, 2005. Most recently, Mr. Radcliffe held the position of District Manager in the Sales Force.

Sincerely,
Danielle Nelson
Vice President, Human
Resources Administration &
EEO Compliance

PURDUE

One Stamford Forum
Stamford, CT 06901-3431
www.purduepharma.com

June 23, 2005

Mr. Mark T. Radcliffe
213 Pinewood Drive
Shady Spring, WV 25918

Dear Mark:

As we have informed you, due to recent adverse business developments Purdue Parma L. P. ("Purdue"), whose headquarters are located at One Stamford Forum, Stamford, CT 06901, is reducing staffing levels in various field based positions in the Sales Department throughout the United States.

In connection with this restructure, a decision has been made to terminate your employment with the Company. This action is intended to be permanent. You are required to report to work through July 7,2005.

These field based terminations are expected to occur on August 25, 2005. As a result, your employment will end on August 25, 2005. If the company determines or has determined that your services no longer are required during all or part of this notice period, you will continue to receive pay and benefits in accordance with applicable Company policies and plan documents through August 25, 2005 unless you resign prior to that date.

There are no seniority or bumping rights.

If you have questions, please contact Danielle Nelson, Vice President, Human Resources Administration at (203) 588-7035.

Danielle Nelson
Vice President, Human
Resources Administration &
EEO Compliance